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Supreme Court of the United States

October Term, 1991

LAWRENCE H. CRANDON, THOMAS K. JONES, HAROLD KITSON, JR., MELVYN R. PAISLEY AND HERBERT A. REYNOLDS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition follows the Fourth Circuit's divided decision reversing the district court's award of attorneys' fees and expenses to petitioners under the Equal Access to Justice Act ("EAJA") upon remand after this Court's decision in *Crandon v. United States*, 494 U.S. 152 (1990). The following questions are presented:

1. Are corporate employees excluded from eligibility under the EAJA simply because indemnification for legal fees may be available from their employer under a state statute, where the employees retain their own lawyer and are personally obligated by contract with the lawyer to pay his fees whether or not they are indemnified by their employer?

2. Does an individual who hires and becomes personally liable for paying his lawyer "incur" attorneys fees within the meaning of the EAJA, notwithstanding the availability of funds to pay the legal fees from a collateral source?

3. Do this Court's holdings in *Pierce v. Underwood* and *Cooter & Gell v. Hartmarx* permit courts of appeals to engage in an "independent assessment" of the reasonableness of the government's position when reviewing a district court's determination whether the government's position was "substantially justified" under the EAJA?

4. Under the EAJA, is the substantial justification for the government's position determined solely by reference to the strength of its legal arguments, or may the trial court in the exercise of its discretion also consider other factors going to the reasonableness of the government's decision to litigate, such as the unprecedented nature of the lawsuit and the government's long acquiescence in the challenged conduct?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT 2

A. Background—Petitioners' Receipt Of Severance Payments 3

B. The Government's Lawsuit 4

C. The Litigation On The Merits 5

D. Petitioners' Legal Fees 6

E. Petitioners' Fee Application 7

REASONS FOR GRANTING THE WRIT 10

I. The Fourth Circuit Drastically Restricted The EAJA, Contrary To The Established Definition Of A Critical Term In The Statute And In Disregard Of The Trial Court's Well Supported Factual Findings 11

Page

II. Contrary To This Court's Mandate In *Pierce v. Underwood*, The Fourth Circuit Engaged In *De Novo* Review Of The District Court's Fact-Based Determination That The Government's Position Was Not Substantially Justified, And Improperly Narrowed The District Court's Inquiry Under The EAJA 20

CONCLUSION 28

APPENDICES

Appendix A. Opinion of Court of Appeals 1a

Appendix B. Opinion of District Court 25a

Appendix C. Opinion of District Court (on the merits) 32a

Appendix D. Judgments and Orders of District Court 46a

Appendix E. Judgment of Court of Appeals 55a

TABLE OF AUTHORITIES

CASES Page

Adkins v. Auto Owners Ins. Co.,
105 Mich.App. 430, 306 N.W.2d 312 (1981).....14

American Indem. Co. v. Olesijuk,
353 S.W.2d 71 (Tex. Civ. App. 1961).....16

In re American Int'l Airways, Inc.,
68 B.R. 326 (E.D. Pa. 1986).....14

Anderson v. Bessemer City,
470 U.S. 564 (1985).....19, 21

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986).....27

Barash v. Public Fin. Corp.,
658 F.2d 504 (7th Cir. 1981).....14

Bauer Bros. Co. v. Commissioner of Internal Revenue,
46 F.2d 874 (6th Cir.)
cert. denied, 283 U.S. 85 (1931).....14

Bailey v. United States,
721 F.2d 357 (Fed. Cir. 1983).....24

In re Caceres Johnson P.R., Inc.,
91 B.R. 200 (Bankr. D.P.R. 1988).....14

Ceglia v. Schweiker,
566 F. Supp. 118 (E.D.N.Y. 1983).....14

Chee v. Schweiker,
563 F. Supp. 1362 (D. Ariz. 1983).....14

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384.....20, 21, 23

Page

Crandon v. United States,
494 U.S. 152 (1990) *rev'g United States v. Boeing*, 845 F.2d 476 (4th Cir. 1988), *aff'g in part & rev'g in part* 653 F. Supp. 1381 (E.D. Va 1987).....2, 6, 24, 26, 27

Dillione v. Deborah Hosp.,
113 N.J. Super. 548, 274 A.2d 597 (1971).....16

In re Donovan,
877 F.2d 982 (D.C. Cir. 1989).....13

In re Emerald Oil Co.,
695 F.2d 833 (5th Cir. 1983).....13

In re Energy Coop.,
103 B.R. 171 (Bankr. N.D. Ill. 1986).....14

FERC v. Martin Exploration Mgmt. Co.,
486 U.S. 204 (1988).....12

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274 N.C. 115, 161 S.E.2d 485 (1968).....14, 16

Hall v. Cook County,
369 Ill. 528, 195 N.E. 54 (1935).....14

Icicle Seafoods, Inc. v. Worthington,
475 U.S. 709 (1986).....19

In re Iowa Premium Serv. Co.,
695 F.2d 1109 (8th Cir. 1982).....13

Jackson v. Virginia,
443 U.S. 307 (1979).....27

Mallard v. United States Dist. Ct. for S. Dist. of Iowa, 490 U.S. 296 (1989).....12

Page

Margolis v. Prudential Ins. Co. of America,
629 F. Supp. 195 (D.D.C. 1985).....14

Maryland Cas. Co. v. Thomas,
289 S.W.2d 652 (Tex. Civ. App. 1956).....14

MCI Telecommunications Corp. v. MCI Communications Corp.,
C.A. No. 89C-MR-216, 1990 WL 91100 (Del. Super. Ct.
June 19, 1990).....19

In re Miniscribe Corp.,
123 B.R. 86 (Bankr. D. Colo. 1991).....14

Myers v. Sullivan,
916 F.2d 659 (11th Cir. 1990).....24, ,25

Phillips v. General Serv. Adm'r,
924 F.2d 1577 (Fed. Cir. 1991).....15

Pierce v. Underwood
487 U.S. 552 (1988).....8, 20-23, 27

Quarles Pet. Co. v. United States,
551 F.2d 1201 (Ct. Cl. 1977).....13

Rawlings v. Heckler,
725 F.2d 1192 (9th Cir. 1984).....24

Reliance Mut. Life Ins. Co. of Illinois v. Booher,
166 So.2d 222 (Fla. Dist. Ct. App. 1964).....14

Rubin v. Empire Mut. Ins. Co.,
25 N.Y.S.2d 426, 306 N.Y.2d 914, 255 N.E.2d 154 (1969)14, 16

Russell v. Thermalito Union School Dist.,
176 Cal. Rptr. 1, 115 Cal. App. 3d 880 (1981).....14

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908 F.2d 1407 (8th Cir. 1990).....

Page

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142 F.Supp. 354 (D. Del. 1956),
aff'd, 242 F.2d 70 (3d Cir. 1957).....14, 18

Spencer v. NLRB,
712 F.2d 539 (D.C. Cir. 1983), *cert. denied*,
466 U.S. 936 (1984).....24, 25

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612 F.2d 1291 (Temp. Emer. Ct. App. 1979),
aff'g 465 F. Supp. 274 (N.D. Ohio 1978).....14

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286 F.2d 600 (5th Cir. 1961).....13

Unification Church v. INS,
762 F.2d 1077 (D.C. Cir. 1985).....16

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238 F.2d 594 (8th Cir. 1956).....13,16

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489 U.S. 235 (1989).....12

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775 F.2d 447 (1st Cir. 1985).....20

Wall Industries, Inc. v. United States,
15 Cl. Ct. 796 (1988),
aff'd mem., 883 F.2d 1027 (Fed. Cir. 1989).....16

Walsh v. Grange Mut. Cas. Co.,
1 Ohio App.2d 304, 204 N.E.2d 690 (1964).....14, 16

Wayte v. United States,
470 U.S. 598 (1985).....25

West Virginia Univ. Hosp., Inc. v. Casey,
111 S.Ct. 1138 (1991).....12

Page

In re White River Corp.,
799 F.2d 631 (10th Cir. 1986) 13

STATUTES

18 U.S.C. § 209 ..... *passim*

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2412(d)(1)(A) ..... *passim*

Del. Code Ann. tit. 8, § 145(c) 8, 11

N.Y. Bus. Corp. Law §§ 722-25 11

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(3d ed. 1992 Supp.) 13

Page

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Lawrence H. Crandon, Thomas K. Jones, Harold Kitson, Jr., Melvyn R. Paisley and Herbert A. Reynolds petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in *United States of America v. Melvyn R. Paisley, Thomas K. Jones, Herbert A. Reynolds, Harold Kitson, Jr., and Lawrence H. Crandon*.

OPINIONS BELOW

The opinion of the court of appeals is reported at 957 F.2d 1161 and is set forth in Appendix A to this Petition (cited as "App."). The opinion of the district court is reported at 747 F. Supp. 319 and is set forth in Appendix B.

This case was previously before this Court during the October 1989 Term, at which time the Court unanimously reversed an earlier judgment of the United States Court of Appeals for the Fourth Circuit. *Crandon v. United States*, 494 U.S. 152 (1990), *rev'g United States v. Boeing Co.*, 845 F.2d 476 (4th Cir. 1988), *aff'g in part and rev'g in part* 653 F. Supp. 1381 (E.D. Va. 1987).

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1992. The Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 2412(d)(1)(A) provides in pertinent part:

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT

This case began in 1986 when the government filed a civil action against former and current government employees, claiming that their receipt of severance payments from their former private employer had violated a criminal conflict-of-interest statute, 18 U.S.C. § 209. On the prior sojourn in this Court, all nine Justices found incorrect the Fourth Circuit's 2-1 opinion that held 18 U.S.C. § 209 applicable to one-time, irrevocable severance payments received prior to entry into government service.

On remand, petitioners sought to recover legal fees from the government under the EAJA. The district judge, who had conducted the trial, found that the Government had failed to sustain its burden

of proving that its position was substantially justified. App. 28a. He further ruled that petitioners had "incurred" fees within the meaning of the EAJA because at all times they were personally obligated to pay their lawyers. The district court rejected the government's argument that the petitioners had not "incurred" fees because they may be covered by a Delaware statute that provides for indemnification by a Delaware corporation of an individual who is made a party to an action "by reason of the fact that he is or was a[n] . . . employee of the corporation." The district court ordered the government to reimburse a portion of petitioners' substantial legal fees. As in the merits phase of this litigation, a divided court of appeals reversed.

A. Background — Petitioners' Receipt Of Severance Payments

Petitioners are five former employees of The Boeing Company, who resigned or took early retirement from the company in 1981 or 1982 to accept important positions in the Executive Branch of the Federal Government, four with the Department of Defense, one with NATO. App. 34a-35a. In each case the government recruited the individual and each man agreed to become a candidate for the proposed government position. App. 33a.

Before the government formally offered any of the men positions, Boeing informed each man of his eligibility for a severance payment and invited him to prepare his own estimate of the anticipated total financial impact of retiring or resigning from Boeing at that stage of his career. JA (1987) 332, 333, 335, 336, 338.[1] This invitation was in accordance with long-standing Boeing policy. Boeing had made a total of 21 similar severance payments between 1962 and 1982, and had fully disclosed all such payments to the government. App. 33a-34a.

Each man received an unconditional and irrevocable lump-sum severance payment before leaving Boeing and before being formally

[1]JA refers to the Joint Appendix filed in the court of appeals in the instant case. JA (1987) refers to the Joint Appendix filed in the court of appeals in the appeal on the merits.

appointed to the proposed government position. App. 35a. None of the men promised to return to Boeing at a later time and Boeing made no commitment to rehire them. *Id.* Boeing unilaterally determined the amount of the payments. App. 36a. The government presented no evidence that, until suit was filed, any of the men knew how Boeing calculated the amount of severance payments or even what financial factors Boeing had taken into account. *E.g.*, JA (1987) 557, 1045, 1056. The payments made by Boeing ranged from 22 to 75 per cent of the amounts the petitioners had requested. JA (1987) 332-40.

Before being appointed to their government positions, the men disclosed to the government the possibility that they might receive severance payments; after their appointments, they disclosed their actual receipt of those payments to responsible government officials. App. 37a-38a. The first two of the recruited Boeing employees discussed the proposed payments both with the government officials who were to be their superiors and with Defense Department legal counsel. The four Defense Department recruits submitted SF-278 Financial Disclosure Reports, which included the sources and amounts of the payments. The responsible Defense Department officials reviewed and certified that they were "satisfied that there is no actual or potential conflict of interest." *E.g.*, JA (1987) 121-22, 126-27, 148-49, 1035-37, 1060-63.

After entering government service, none of the individual petitioners provided Boeing with any favored treatment or, indeed, participated in any source selection or procurement decision that affected Boeing. App. 37a, 43a. It was stipulated at trial that all five were competent and faithful government servants and, at the trial, Secretary of the Navy John F. Lehman testified for the defense. App. 36a; JA (1987) 1072.

B. The Government's Lawsuit

The government did not get around to filing its complaint until July 22, 1986, which was between four and five years after the petitioners had received their severance payments. App. 35a. The

government's complaint was an unprecedented attempt to rely in a civil action on the criminal conflict-of-interest provisions embodied in 18 U.S.C. § 209, which makes it a crime for federal officers knowingly to accept a "supplementation of salary, as compensation for services as an officer or employee" of the government. Thus, it was against petitioners that the government chose to bring their first civil action based on section 209 after 24 years on the books (or, indeed, based on the predecessor statute to section 209, which had been on the books since 1914). Nor had the government ever promulgated regulations or guidelines for its prospective employees regarding the legality of severance payments. Nevertheless, the government sought to recover twice the amount of the severance payment (plus interest) — once from Boeing and once from the recipients.

C. The Litigation On The Merits

The trial judge, sitting without a jury, conducted a trial that included live testimony from two of the five individual defendants, a government auditor, and the Secretary of the Navy. JA (1987) 988, 1007-78. The trial judge made detailed findings of fact and conclusions of law. He concluded that the acceptance of a severance payment before entry into government service does not violate 18 U.S.C. § 209. App. 41a. Alternatively, he found that the payments did not violate section 209 because they were neither paid nor received with the intent that they act as a supplementation to the government salaries or as compensation for government services. App. 41a-42a. The trial court also found that the severance payments were timely disclosed to the government and therefore did not violate common-law agency principles, which prohibit only secret profits. App. 42a-43a. Finally, he held that the payments created neither the appearance of nor an actual conflict of interest because none of the individuals was in a position to — nor in fact did — render preferential treatment to Boeing, and, as a result, the government suffered no injury. App. 43a.

On appeal, the Fourth Circuit, in a divided decision, reversed the district court's conclusion that section 209 does not apply to severance payments made prior to entry into government service.

845 F.2d at 480. In addition, while the court agreed that liability can be imposed under section 209 only when the defendant specifically intends to pay or receive the money "as compensation for government service," the majority rejected the trial judge's finding that Boeing and the individual defendants did not possess the requisite intent, even though the court acknowledged that the trial judge's finding was "based largely on statements by individual defendants and others at Boeing." *Id.* The panel also rejected the trial judge's findings that the individuals' disclosure of the payments obviated any potential conflict of interest and that the government had suffered no injury. *Id.* at 481.

In dissent, Judge Hall objected to the majority's statutory construction as well as to its reversal of the trial judge's findings on the issue of intent. Judge Hall reminded the majority that the issue of intent is "a factual determination purely within the province of the district court," which had reached its finding "after hearing substantial testimony and weighing the credibility of numerous witnesses." *Id.* at 483.

This Court unanimously reversed. The Court's decision, joined in by six Justices, held that section 209(a) requires status as a government employee at the time of payment. 494 U.S. at 159. Three Justices filed a concurring opinion in which they concluded that section 209(a) applies only to periodic payments, and could never apply to unconditional, lump sum payments. *Id.* at 174-75. Because this Court resolved the case based on its construction of section 209, neither opinion addressed petitioners' arguments concerning the court of appeals' reversal of the trial judge's findings on intent or injury.

D. Petitioners' Legal Fees

In order to defend themselves against the government's lawsuit — alleging a criminal violation based on an action that the government had previously approved — petitioners retained counsel to represent them. The individuals hired their own attorneys and agreed to be responsible for their fees. During the lengthy course of

discovery, pre-trial motions, trial and two appeals on the merits, petitioners' legal fees amounted to hundreds of thousands of dollars.

Fortunately, the Board of Directors of Boeing, acting pursuant to Delaware law and Boeing's by-laws, agreed to advance funds to the petitioners to cover their legal bills. In order to obtain the advances, the petitioners were required to — and did — execute undertakings promising to repay the advances to Boeing unless the Board votes to indemnify them, an event which has not yet occurred. Boeing initially declined to advance fees to petitioners Crandon and Paisley because they were still government employees at the time the lawsuit was filed. (Paisley began to receive advances after he left government service in 1987.) As a result, during the course of litigation on the merits, Crandon received no advances, and Paisley paid over $20,000 in legal fees out of his own pocket and ended up owing his lawyers an additional $40,000 that he was unable to pay. JA (1987) 50, 70.

Notwithstanding its agreement to advance fees to petitioners, no fee arrangement existed between Boeing and petitioners' counsel. As the district court expressly found, petitioners' attorneys at all times viewed themselves as answerable only to petitioners. Petitioners were personally contractually liable to their lawyers, and the lawyers affirmed that they looked to petitioners for ultimate payment of their fees. Boeing had no role in retaining petitioners' lawyers and exercised no control over the petitioners' defense or the conduct of petitioners' lawyers. App. 27a.

E Petitioners' Fee Application

Following remand from this Court, petitioners applied to the district court for attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). Petitioners sought to recover from the government the attorneys' fees which they had obligated themselves to pay to their attorneys, but which Boeing had largely advanced. Because of the hourly rate limitations of the EAJA, the amount sought was far less than the fees actually charged.

The district court ruled in favor of petitioners. It rejected the government's argument that petitioners were not the real parties in interest because fees had been advanced by Boeing and because Delaware law calls for indemnification of former corporate employees who successfully defend a lawsuit brought against them "by reason" of their employment. Del. Code Ann. tit. 8, § 145(c). The district court made the factual determination that recovery by petitioners of their attorneys' fees from Boeing was only a "possibility," and held that "the mere possibility of future indemnification" did not disquality them under the EAJA, because at all times they were personally liable for their legal fees. App. 27a.

The district court also held that the government had failed to satisfy its burden that its position was substantially justified. App. 28a. The district court emphasized that although the statute had been on the books in its current form for 27 years, "this is the first time the government has ever brought a criminal or civil case against anyone for receiving a severance payment, and this is the only time the government has tried to apply that provision to a person receiving any kind of payment before entering government service." *Id.* Relying on the unanimous decision of this Court, the district court concluded that the government's construction of section 209 found no substantial justification in the text or legislative history of the statute. App. 28a-29a. The judge rejected the government's suggestion that "the fact that two appellate judges agreed with the government's position" in and of itself "make[s] it a substantially justified one." App. 29a. The trial court concluded that "[a]lthough the government has the right to seek modification or repudiation of established doctrine, the EAJA exists to ensure that individual private litigants are not compelled to subsidize such re-evaluations." *Id.*

Once again, a divided Fourth Circuit reversed. Purporting to apply the abuse-of-discretion standard set forth in *Pierce v. Underwood*, 487 U.S. 552 (1988), the majority proceeded explicitly to embark on a *de novo* review: "we turn to an independent assessment of the strength of — the justification for — the Government's position . . . ." App. 12a. The court of appeals objected to the fact that "the district court accorded no weight to the cogency of the

reasoning'' of two circuit judges, App. 14a, and charged that the district court had ''seriously underestimated the Supreme Court's recognition of the difficulty of the interpretive issue.'' App. 15a. Finally, contrary to the district court's weighing of the relevant factors, the appellate court found that this Court's use of the rule of lenity in resolving the interpretive issue cut against petitioners, and that the unprecedented nature of the case was ''completely neutral.'' App. 12a.

The court of appeals also held that given the existence of the Delaware corporate indemnification provision, the petitioners had not ''incurred'' legal fees. App. 6a-7a. First, the court disregarded the district court's finding of fact that indemnification was a ''mere possibility,'' and instead made its own finding of fact, without record support, that Boeing was required to and actually would indemnify petitioners. App. 7a. Next, having ignored the district court's findings of fact, the court of appeals ignored the statutory language. Rather than addressing whether petitioners had ''incurred'' fees — the language of the EAJA — it concluded that ''the purposes'' and ''critical concern'' of the EAJA required denying recovery to petitioners. App. 7a-8a.

Once again, Judge Hall dissented. Especially without Boeing before the court, he was unwilling to conclude that ''it is a foregone conclusion'' that Boeing will indemnify petitioners, and found no basis to overturn the district court's factual finding that indemnification was only a ''possibility.'' App. 21a. Furthermore, Judge Hall concluded that the government, not Boeing, should be the first line of reimbursement, and that any indemnification obligation of Boeing should be reduced by petitioners' EAJA recovery. '' I see nothing in EAJA that permits the government to stand in back of the line to pay attorneys' fees . . . The government's obligation is fault-based; Boeing's is analogous to insurance. . . [A]ppellees most definitely 'incurred' fees for which they were and are personally liable.'' App. 21a-22a. He quoted the following language from the district court's opinion:

> Simply put, the mere possibility of future indemnification by a company for the attorney's fees incurred by its

> employees is not, in itself, enough to alter the fact that employees who are ultimately liable for those fees are the real parties in interest. Were this not the case, the government would be able to viciously pursue corporate employees with the knowledge that, due to the possibility of later corporate indemnification, the government would not be held accountable for any unjustified conduct. The EAJA would certainly not be served by such a rule. (App. 22a-23a.)

Judge Hall also concluded that the district court did not abuse its discretion in finding that the government failed to establish that its position was substantially justified. Disagreeing fundamentally with the majority's view of the rule of lenity, he explained that the rule of lenity "is a force the government must weigh *before* it decides to go on its foray." App. 23a (emphasis in original). Judge Hall observed that for a period of over 20 years Boeing had disclosed to the government that it had made a total of 21 lump-sum payments to employees departing for government service, that "the government had acquiesced in this practice," that the government had waited over four years to bring its suit, and that it had taken petitioners four more years to vindicate their rights, culminating in unanimous vindication in the Supreme Court. App. 20a. Judge Hall continued:

> The price of vindication, over a half-million dollars of attorneys' fees, was dear — more, indeed, than the government's original complaint sought to recover. Today, the majority permits the government to walk away from the carnage it has wrought and leave the appellees to clean up as they may. (*Id.*)

REASONS FOR GRANTING THE WRIT

This petition presents an important question of federal law concerning the applicability of the EAJA to present or former corporate employees who may be subject to indemnification by their corporate employers under state law. In addition, this case confronts the Court with a situation in which the court of appeals, acting inconsistently

with this Court's precedent, failed to give proper deference to the district court's finding regarding substantial justification under the EAJA. Furthermore, as to two questions (discussed at pp. 15-16 and 23-25, *infra*), the decision of the court of appeals conflicts in principle with the decisions of other circuits.

I. THE FOURTH CIRCUIT DRASTICALLY RESTRICTED THE EAJA, CONTRARY TO THE ESTABLISHED DEFINITION OF A CRITICAL TERM IN THE STATUTE AND IN DISREGARD OF THE TRIAL COURT'S WELL SUPPORTED FACTUAL FINDINGS

1. The issue presented by this case has broad applicability to employees of every corporation in the nation. The law of the State of Delaware provides that an individual who has been successful in defending an action brought against him "by reason of the fact that he is or was" a corporate employee, shall be indemnified by the corporation against expenses, including attorneys' fees, "actually and reasonably incurred." Del. Code Ann. tit. 8, § 145(c). All but seven U.S. jurisdictions have enacted similar indemnification provisions, which are based on the Model Business Corporation Act. The remaining seven jurisdictions all have indemnification statutes, though they differ in form from the Model Act.[2]

The court below held that, because Delaware law provides for corporate indemnification, the government was excused from paying petitioners' legal expenses even though petitioners from the outset of the litigation had been legally obligated to pay their lawyers, and, in one instance, personally had made substantial payments. In other words, the court ruled that fees subject to indemnification have not been "incurred" by the prevailing party. Since all state

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[2]Model Business Corporation Act Annotated 1081-98.1 (3d ed. 1992 Supp.) ("All jurisdictions have indemnification statutes, and all but seven of them are similar to the present or one of the earlier versions of the Model Act," including Delaware). *See, e.g.*, N.Y. Bus. Corp. Law §§ 722-25.

laws provide varying degrees of indemnification to corporate employees who prevail in litigation, the decision below has all but eliminated the availability of the EAJA to defendants who are present or former employees of corporations in cases where there is any kind of nexus between the lawsuit and the individual's status as a corporate employee.

2. The Fourth Circuit's conclusion that the EAJA does not permit petitioners to recover from the government if the Delaware statute imposes a parallel obligation on Boeing finds no support in the language of the statute. "Interpretation of a statute must begin with the statute's language." *Mallard v. United States Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 300 (1989). "[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'" *West Virginia Univ. Hosp., Inc. v. Casey*, 111 S.Ct. 1138, 1147 (1991); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *see also, e.g., FERC v. Martin Exploration Mgmt. Co.*, 486 U.S. 204 (1988).

Despite the existence of this well established principle, the court of appeals never even stopped to consider the definition of the word "incurred," but, instead, leapt immediately into its view of the congressional purpose in enacting the EAJA. After concluding that Boeing was obliged to reimburse petitioners and that Boeing would not "default deliberately on its legal obligation," the court of appeals next stated:

> Aside from the unseemliness of such a judicial assumption, such a holding would not in fact serve a principal purpose of the EAJA: to avoid the deterring effect which liability for attorney fees might have on parties' willingness and ability to litigate meritorious civil claims or defenses against the Government. The EAJA provides for fee-shifting precisely to avoid this result. . . . [T]o effectuate the purposes of the EAJA, a claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the EAJA, hence is not eligible for an award of fees under that Act. (App. 7a.)

The failure of the court of appeals to consider the definition of "incurred" is highlighted by its phrasing of the issue not as whether fees were "incurred," but as whether the expenses should be "deemed" to have been incurred. App.6a, 8a.

The word "incurred" has a clear meaning in the English language generally and in legal usage. "To incur" is "to become liable to," "responsible for," "legally obligated to pay," or "subject to." Numerous dictionaries (including legal dictionaries)[3] and literally dozens of federal and state cases uniformly give the word "incur" that definition.[4]

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[3]*E.g.*, *Webster's Third New International Dictionary* 1146 (G.&C. Merriam Co. 1971) ("to meet or fall in with (as an inconvenience): become liable or subject to . . . ."); *Webster's Second New International Dictionary* 1261 (G.& C. Merriam Co. 1934) ("To meet or fall in with, as something inconvenient or harmful; to become liable or subject to . . . ."); *The American Heritage Dictionary* 653 (2d College ed. Houghton Mifflin Co. 1982, 1985) ("To become liable or subject to, esp. as a result of one's own actions . . . ."); *Webster's New Collegiate Dictionary* 423 (G.& C. Merriam Co. 1961) ("To meet with, as a thing inconvenient or harmful; become liable to . . . ."); VII *The Oxford English Dictionary* 834-35 (2d ed. 1989); *Black's Law Dictionary* 768 (6th ed. 1990) ("To become liable or subject to . . . ."); *Ballentine's Law Dictionary* 606 (3d ed. 1969) ("To bring upon one's self. To become subject to liability by act or operation of law"); Burton, *Legal Thesaurus* 273 (1980) ("acquire, assume, bargain for, become liable for, become responsible for . . . .").

[4]*E.g.*, *Quarles Pet. Co. v. United States*, 551 F.2d 1201, 1205 (Ct. Cl. 1977) ("To incur means to become liable for or subject to; it does not mean to actually pay for") (footnote omitted); *In re Donovan*, 877 F.2d 982, 991 (D.C. Cir. 1989) ("the term 'incurred' [means] actual fees which the subject paid *or* for which he is liable"); *In re White River Corp.*, 799 F.2d 631, 632 (10th Cir. 1986) ("a debt is incurred when a debtor first becomes legally bound to pay"); *In re Iowa Premium Serv. Co.*, 695 F.2d 1109, 1111 (8th Cir. 1982) (en banc) ("a debt is incurred on the date upon which the debtor first *becomes legally bound to pay*"); *United States v. St. Paul Mercury Indem. Co.*, 238 F.2d 594, 598 (8th Cir. 1956) ("'Incur emphasizes the idea of liability'"); *In re Emerald Oil Co.*, 695 F.2d 833, 837 (5th Cir. 1983) ("the debt is incurred on the date that the debtor becomes liable for it"); *Stuyvesant Ins. Co. of New York v. Nardelli*, 286 F.2d 600, 603 (5th Cir. 1961) ("The term 'incur,' when used in policies of insurance, has a fixed legal meaning. 'A debt has been incurred when

In this case, of course, the petitioners were liable to and legally obligated to pay their lawyers. The district court so found and the court of appeals did not disagree. If Boeing had not advanced fees, petitioners would have had to pay from their own assets, as Paisley,

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liability attaches'''); *Barash v. Public Fin. Corp.*, 658 F.2d 504, 510 (7th Cir. 1981) (''construing 'incurred' to mean when a debtor first becomes legally bound to pay comports . . . with the plain meaning of the word''); *Standard Oil Co. of Ohio v. Fed. Energy Admin.*, 612 F.2d 1291, 1294 (Temp. Emer. Ct. App. 1979) (''future costs can be regarded as having been 'incurred' before actual payment takes place''), *aff'g* 465 F. Supp. 274, 280 (N.D. Ohio 1978) (''A cost is normally incurred, regardless of amount, when a reciprocal obligation to pay for the item received arises''); *Bauer Bros. Co. v. Commissioner of Internal Revenue*, 46 F.2d 874, 875 (6th Cir.), (''expenses are incurred only when there is an agreement or a legal obligation to pay them within the taxable year''), *cert. denied*, 283 U.S. 850 (1931); *Margolis v. Prudential Ins. Co. of America*, 629 F. Supp. 195, 198 (D.D.C. 1985) (''Where there is no obligation to pay for a thing provided, there is no 'expense incurred' ''); *Ceglia v. Schweiker*, 556 F. Supp. 118, 122 (E.D.N.Y. 1983) (''Plaintiff maintains that the term ''incurred' as used in the statute should not be given a narrow reading requiring the plaintiff to be actually liable for the fees awarded''); *Chee v. Schweiker*, 563 F. Supp. 1362, 1364 (D. Ariz. 1983) (''The terms 'fees' and 'incurred' indeed connote an obligation to pay''); *Sorensen v. Overland Corp.*, 142 F. Supp. 354, 361 (D. Del. 1956) (''Where indemnity agreements use 'incurred' the indemnity is against liability and not against loss or damage''),*aff'd*, 242 F.2d 70 (3d Cir. 1957); *In re Miniscribe Corp.*, 123 B.R. 86, (Bankr. D. Colo. 1991) (''a debt is incurred when a debtor first becomes legally obligated to pay''); *In re Energy Coop.*, 103 B.R. 171, 174 (Bankr. N.D. Ill. 1986) (''a debt is incurred . . . when the debtor *becomes legally obligated to pay*''); *In re Caceres Johnson P.R., Inc.*, 91 B.R. 200, 202 (Bankr. D.P.R. 1988) (''a debt is incurred . . . when the debtor becomes legally obligated to pay''); *In re American Int'l Airways, Inc.*, 68 B.R. 326, 327 (Bankr. E.D. Pa. 1986); *Russell v. Thermalito Union School Dist.*, 115 Cal. App. 3d 880, 176 Cal. Rptr. 1, 2 (Ct. App. 1981); *Reliance Mut. Life Ins. Co. of Illinois v. Booher*, 166 So.2d 222, 224 (Fla. Dist. Ct. App. 1964); *Hall v. Cook County*, 359 Ill. 528, 195 N.E. 54, 62 (1935); *Adkins v. Auto Owners Ins. Co.*, 105 Mich.App. 430, 306 N.W.2d 312 (1982); *Rubin v. Empire Mut. Ins. Co.*,25 N.Y.2d 426, 306 N.Y.S.2d 914, 916, 255 N.E.2d 154 (1969); *Graham v. Reserve Life Ins. Co.*, 274 N.C. 115, 161 S.E.2d 485, 490 (1968); *Walsh v. Grange Mut. Cas. Co.*, 1 Ohio App.2d 304, 204 N.E.2d 690, 691 (1964); *Maryland Cas. Co. v. Thomas*, 289 S.W.2d 652, 655 (Tex. Civ. App. 1956).

in fact, did. If Boeing does not indemnify petitioners and they are required to repay the advances, they will not be able to recover amounts already paid to their lawyers and would be legally bound to pay all their unpaid legal bills. Under the plain meaning of the word, they "incurred" fees. The Fourth Circuit's view of sound policy is not a proper basis for ignoring the established meaning of the words used in the statute.

3. While perhaps not rising to the level of a split in the circuits, the decision below is at odds with a 1991 case from the Federal Circuit, a case relied on by petitioners but ignored by the court of appeals. In *Phillips v. General Serv. Adm'r*, 924 F.2d 1577 (Fed. Cir. 1991), the court awarded legal fees under the EAJA where the plaintiff had a contingency fee arrangement under which her lawyer agreed to represent her for $2500 plus whatever additional fees might be awarded under the EAJA. The plaintiff "was not responsible for further payment of . . . charges and no further payment was made by her during the course of the litigation." *Id.* at 1582. The court nevertheless allowed recovery of attorneys' fees in excess of $2500. "Inherent in the agreement is an intention on the part of Ms. Phillips to be obligated to her counsel for fees properly obtainable under the statute." *Id.* at 1583. The court held that the plaintiff had "incurred" fees despite the fact that the plaintiff made no payments during the course of the litigation and had no responsibility for any further payments, and despite the fact that there was a strong possibility she would never be obligated to pay her attorney any more money. If Ms. Phillips "incurred" fees under the EAJA, then *a fortiori* the petitioners in this case did, since, as the district court found, petitioners' obligation to pay their lawyers is concrete and absolute, as Paisley learned when he had to pay $20,000 from his own pocket.

The one case cited in the panel's opinion, as well as the cases relied upon by the government below, involved situations in which the fee applicant had *no* obligation to pay attorneys' fees, because at the outset of the case a third party had retained and unconditionally agreed to pay the lawyers. In those cases, the applicants were never legally obligated to pay the lawyers and, therefore,

did not "incur" any obligation. *SEC v. Comserv Corp.*, 908 F.2d 1407, 1413-14 (8th Cir. 1990) (cited by court of appeals, App. 7a) ("Comserv, not Johnson, was legally obligated to pay Johnson's attorneys' fees" so "Johnson was never exposed to unconditional liability for legal fees in the SEC litigation"); *Wall Industries, Inc. v. United States*, 15 Cl. Ct. 796, 799, 802 (1988) ("no credible evidence was proffered establishing that Wall assumed *any* responsibility to pay for the legal fees and other expenses incurred in the refund litigation," so Wall had not "incurred" fees) (emphasis added), *aff'd mem.*, 883 F.2d 1027 (Fed. Cir. 1989); *Unification Church v. INS*, 762 F.2d 1077, 1082 (D.C. Cir. 1985) (" 'arrangement' for payment for his [attorney's] services is solely with the Unification Church").

4. The critical distinction based on whether an individual is legally responsible for payment is well known and established in insurance law. In cases where an insured has no legal obligation to pay expenses, the insured did not incur an obligation and there is no coverage. But where the insured becomes legally responsible for payment, he incurs expenses and is entitled to coverage. The key in insurance law — as was the key in *Phillips* — is legal obligation, not actual payment.[5]

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[5]For example, in *American Indem. Co. v. Olesijuk*, 353 S.W.2d 71, 72 (Tex. Civ. App. 1961), the court held an insurance company liable on a policy that provided for payment to an insured when he "incurred" expenses. The court reasoned that because the insured "became liable for the payment of the charges therefor, such charges were incurred by him and [the insurance company] became liable to him for such expenses so incurred." The court held inapplicable cases involving suits by veterans who received treatment free of charge: "[T]reatment was free to the veteran, therefore, he could incur no liability therefor . . . . The insured was not and could not be liable for any amount thereof." *Id.* at 73. *Olesijuk* has been cited with approval in *Rubin v. Empire Mut. Ins. Co.*, 25 N.Y.2d at 429, 306 N.Y.S.2d at 916; *Walsh v. Grange Mut. Cas. Co.*, 204 N.E.2d at 691; *Dillione v. Deborah Hosp.*, 113 N.J. Super. 548, 274 A.2d 597, 600 (1971); *Graham v. Reserve Life Ins. Co.*, 161 S.E.2d at 490. *See also United States v. St. Paul Mercury Indem. Co.*, 238 F.2d 594, 598 (8th Cir. 1956) (free hospital care provided to veteran "cannot in law be claimed to constitute an 'expense incurred'").

As Judge Hall pointed out in dissent, while "the government's [EAJA] obligation is fault-based," Boeing's indemnification obligation is "analogous to insurance." App. 22a. To hold that the existence of insurance means that a litigant does not "incur" expenses is contrary to the most fundamental principles of insurance coverage. The same logic would conclude that a person injured by another's fault has not incurred damages if his medical insurer pays his medical bills. As Judge Hall explained, the "majority's decision rejects the wisdom of the common-law collateral source rule, which does not permit the wrongdoer to profit from his victim's foresight to secure an insurer." *Id.*[6]

Indeed, under the Fourth Circuit's crabbed reading, the EAJA would be unavailable to individuals with any source of reimbursement for their legal fees. The court held that "to effectuate the purposes of the EAJA, a claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the EAJA." App. 7a-8a. According to the Fourth Circuit, therefore, a person who purchased liability insurance that reimburses his legal fees could never seek redress under the EAJA for the government's overreaching. Nor could a fee applicant with a contractual claim for reimbursement from a third party. In fact, if a wealthy aunt induced the individual to undertake a defense by promising to reimburse his legal bills if he is vindicated at trial, the court below would deny his EAJA claim because he has a "legally enforceable right" to recover from his aunt on the basis of promissory estoppel. There simply is no basis in the language or legislative history of the EAJA for so restrictive a reading of the statute. As Judge Hall observed,

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[6]It is worth noting that if a current or former corporate employee receives reimbursement for attorneys' fees under the EAJA, only a portion of the employee's fees will be covered, since the maximum hourly rate awardable under the EAJA — $75 per hour adjusted by the cost of living ($106 in this case) — is far below current market rates for lawyers. Thus, the corporate employer would never be entirely relieved of its indemification obligation by the EAJA, but would face, at best, a reduced obligation.

the Fourth Circuit's holding is likely to have devastating consequences for the availability of the EAJA and its effectiveness in achieving the congressional goal of deterring unreasonable government litigation. This Court should resolve the issue.

5. The Court also should hear this case to correct the appellate court's failure properly to defer to the trial court's findings. The district court made a factual determination that Boeing's payment of petitioners' legal fees must be considered no more that a "mere possibility." Ample evidence existed in the record before the court to support this finding. Boeing had not retained petitioners' counsel and had not exercised any control over the defense or conduct of the petitioners' attorneys. JA 108. Boeing had not advanced fees to two of the petitioners. Boeing was not before the court and would not be bound by any determination regarding its indemnification obligation. JA 109. Boeing's Board of Directors had made no decision to indemnify petitioners. JA 108.[7]

Equally important, the district court recognized that Boeing had available the argument that it should not have to pay petitioners' legal bills because suit had not been brought against each petitioner "by reason of the fact that he is or was a director, officer, employee or agent of the corporation," one of the pre-requisites for indemnification under the Delaware statute. The government had charged petitioners with violating their duty to the United States by their receipt of the severance payments, and had alleged no wrongdoing by them related to their work for Boeing. *See Sorensen v. Overland Corp.*, 242 F.2d 70 (3d Cir. 1957); E. Falk, *The Delaware General Corporation Law* 102 (1972). Thus, it is far from clear whether this lawsuit was brought against petitioner "by reason of the fact" that

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[7]*See also* E. Veasy, J. Finkelstein, C. Bigler, *Delaware Supports Directors With Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 The Business Lawyer 399, 408 (1987) ("Entitlement to indemnification is not automatic, whether permissive or mandatory, whether by statute, by-law, or contract. A determination of ultimate entitlement must be made by the appropriate decisionmaker").

they were Boeing employees. Boeing also might argue that the amount of expenses incurred was unreasonable.[8]

The court of appeals summarily reversed the district court's finding and concluded, despite the substantial support in the record for the trial court's finding, that Boeing was obligated to and would indemnify petitioners. Judge Hall took the majority to task for its failure to defer to the district court's finding. As he stated in his dissent,

> I do not share the majority's confidence . . . that indemnification by Boeing is a foregone conclusion . . . . Aside from this court's lack of day-to-day familiarity with Delaware law, Boeing is not even before us. It may fight indemnification claims; the record before us contains no concessions or waivers from Boeing. We have no way of knowing what creative arguments its lawyers may present to the state courts. (App. 21a.)

This Court should remind the Fourth Circuit that it must give proper weight to the factual findings of the district court. *Anderson v. Bessemer City*, 470 U.S. 564, 576 (1985); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986). Moreover, the appellate court's readiness to deny EAJA coverage based on unsupported assumptions and surmise is inconsistent with the salutary purpose of the legislation. This Court should take this opportunity to correct this erroneous approach to questions about eligibility under the EAJA.

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[8]Furthermore, the Delaware courts provide more limited reimbursement than the EAJA; they do not award attorneys' fees incurred by a defendant in enforcing his right to indemnification. *MCI Telecommunications Corp. v. MCI Communications Corp.*, C.A. No. 89C-MR-216, 1990 WL 91100, *12-13 (Del. Super. Ct. June 19, 1990).

II. CONTRARY TO THIS COURT'S MANDATE IN *PIERCE v. UNDERWOOD*, THE FOURTH CIRCUIT ENGAGED IN *DE NOVO* REVIEW OF THE DISTRICT COURT'S FACT-BASED DETERMINATION THAT THE GOVERNMENT'S POSITION WAS NOT SUBSTANTIALLY JUSTIFIED, AND IMPROPERLY NARROWED THE DISTRICT COURT'S INQUIRY UNDER THE EAJA

The EAJA provides that a prevailing party is entitled to attorneys' fees "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The government has the burden of proving that its litigation position was substantially justified. *United States v. Yoffe*, 775 F.2d 447, 450 (1st Cir. 1985); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4953, 4984, 4989, 4997.

1. This Court has held that EAJA fee determinations must be reviewed deferentially, and may be overturned only if an abuse of discretion: "the text of the statute permits, and sound administration counsels, deferential review of a district court's decision regarding attorney's fees under the EAJA." *Pierce*, 487 U.S. at 563. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990) (in analogizing appellate review of Rule 11 sanctions to review of EAJA awards, the Court stated that "[i]n *Pierce*, the Court held a District Court's determination under the [EAJA] that the position of the United States was substantially justified should be reviewed for an abuse of discretion").

The Fourth Circuit, however, chose to ignore this Court's mandate that a district court's EAJA determinations should be reviewed deferentially. Notwithstanding that this Court's decisions in *Pierce* and *Cooter & Gell* clearly answer the question of the proper standard of review for EAJA fee determinations, the Fourth Circuit decided to address that settled question anew: "There remains the question — how deferential?" App. 10a. Then, in complete defiance of this Court's holdings, the Fourth Circuit answered its own ques-

tion: "we turn to an *independent assessment* of the strength of — the justification for — the Government's position." App. 12a (emphasis added).

The Fourth Circuit's "independent assessment" standard — in essence, *de novo* review — flies in the face of this Court's decisions as to the meaning of deferential review. *See Anderson v. Bessemer City*, 470 U.S. at 573-74 ("If the district court's account of the evidence *is plausible* in light of the record viewed in its entirety, the court of appeals *may not* reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently") (emphasis added). By "independently assessing" whether the Government was substantially justified in litigating this case, the Fourth Circuit has completely undermined this Court's decisions in *Pierce* and *Cooter & Gell* and ignored principles of sound judicial administration. The court below apparently rejected this Court's admonitions that "the district court may have insights not conveyed by the record" (*Pierce*, 487 U.S. at 560); and that "only deferential review [gives] the district court the necessary flexibility to resolve questions involving 'multifarious, fleeting, special, narrow facts that utterly resist generalization.' " *Cooter & Gell*, 496 U.S. at 404, *quoting Pierce*, 487 U.S. at 561-62.

2. In fact, the Fourth Circuit has distorted *Pierce* case beyond recognition. The panel inferred that because this Court in the *Pierce* case engaged in a detailed analysis to determine whether the court of appeals had overreached in reversing the district court, it was free to re-examine and re-weigh the evidence underlying the district court's determination. App. at 10a. That analysis turns *Pierce* on its head. *Pierce* was intended to instruct the courts of appeals to leave district court decisions alone as long as the record contains substantial evidence supporting the trial court's determination. This Court's opinion in *Pierce* examined the details of the record simply to demonstrate that the district court's view was supportable and thus must be accepted. In this case, by contrast, the Fourth Circuit reversed the district court simply because it disagreed with the trial judge's assessment of the factors going to the reasonableness of the government's legal and factual positions. The appellate court's

substitution of its own judgment for that of the district court's is precisely what this Court in *Pierce* warned against doing. Under *Pierce*, the trial court has the responsibility for weighing the relevant factors, and the appellate courts may not reverse because they disagree with the balance reached by the trial court. Unreversed, the action of the Fourth Circuit will serve to eviscerate *Pierce*.[9]

The court of appeals also usurped the district court's authority by asserting that the district court had accorded "no weight to the cogency of the reasoning" of the two judges of the Fourth Circuit who had voted to reverse the district court on the merits. App. 14a. In fact, the district court held only that the government's victory before the Fourth Circuit "does not, *in itself*, establish substantial justification." App. 29a (emphasis added). The trial court's position is consistent with this Court's teaching in *Pierce* that "[o]bviously, the fact that one other court agreed . . . with the Government does not establish whether its position was substantially justified" for purposes of the EAJA because "the Government could take a position that is not substantially justified yet win." *Pierce*, 487 U.S. at 569. The district court, therefore, took into account the Fourth Circuit majority opinion, but simply concluded, in the exercise of its discretion, that other factors outweighed the opinion of two of the thirteen judges who have considered this case. Certainly, the petitioners' "side of the case has at least sufficient force that [the Fourth Circuit] cannot possibly state, on the basis of [its prior decision] alone, that the District Court abused its discretion in finding no substantial justification." *Pierce*, 487 U.S. at 569.

3. In addition to misapplying *Pierce*, the panel converted the whole

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[9]The panel also sought to distinguish *Pierce*, on the ground that the merits issues have been finally resolved and there is no danger of indirect "affirmances." But that danger is always present in some degree, as evidenced by the fact that this Court did not reach several merits issues, including the issues of intent and harm to the government. Furthermore, when the case is not finally resolved until after a trial on the merits, the record is considerably longer than when a case is dismissed on motion or is settled, and it makes all the more sense to defer to the trial court's familiarity with the extensive record. *See Pierce*, 487 U.S. at 560.

issue of substantial justification into a limited inquiry of the "legal strength" of the government's position, to the exclusion of other factors going to the reasonableness of the government's action. The panel then proceeded to equate the legal strength of the government's position with its legal right to bring an action: "[T]he Government's interests here were essentially those that inform prosecutorial discretion in criminal matters" and that discretion "must and does involve the targeting of particular conduct at particular times in response to many legitimate factors *having nothing to do with the general legal strength of the claim.*" App. 12a (emphasis added). The panel went on to criticize the trial court on the ground that its action "necessarily implies a more cramped view of the latitude that must be accorded Government interpretations of the reach of untested, ambiguously-drawn criminal statutes than is acceptable." App.19a-20a.

There are two fundamental flaws in this reasoning:

First, the panel's opinion, by limiting the issue under the EAJA to the "legal strength" of the government's case, improperly and unnecessarily restricts the scope of the trial court's inquiry into the justification for the government's position. This Court has observed that a trial judge should consider all the surrounding circumstances when deciding whether the government established that its position was substantially justified. *See Pierce v. Underwood*, 487 U.S. at 562 (issue is "multifarious and novel question"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 401 (analogizing Rule 11 determination to EAJA determination, and holding that "to determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case"); *see also* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4953, 4984, 4989 ("An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate").[10]

[10]By narrowing the issue to the "legal strength" of the government's position, the court of appeals incorrectly took out of the case such factors as the government's brazen attempt to play fast and loose with the courts.

The Fourth Circuit's decision is inconsistent with decisions in other circuits. For example, in *Spencer v. NLRB*, 712 F.2d 539, 559-60 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984), the D.C. Circuit cited three criteria to be used to decide whether the government's position was substantially justified; (1) clarity of the governing law ("The government is always free, of course, to seek modification or repudiation of established doctrine, but individual private litigants should not be compelled to subsidize such reevaluations of controlling doctrine"); (2) foreseeable length and complexity of the litigation; and (3) consistency of the government's position ("a court reviewing an EAJA petition should demand that the government make a particularly strong showing of justification for its position when there is evidence that the petitioner was subject to *atypically* harsh treatment") (emphasis in orginial). *See also, e.g., Myers v. Sullivan*, 916 F.2d 659,665-66 (11th Cir. 1990); *Rawlings v. Heckler*, 725 F.2d 1192 (9th Cir. 1984); *Bailey v. United States*, 721 F.2d 357 (Fed. Cir. 1983).

The Fourth Circuit improperly rejected the district court's reliance, in part, on the fact that the government had not during the 27-year life of section 209 (or the more than 50 years its predecessor was on the books) brought a single civil case based on the statute, much less based on a severance payment made before government employment commenced. The court of appeals also wrongly criticized the district court's consideration of the facts that Boeing had a "long standing practice of making severance payments" ("at least twenty-one" from 1962-82); that "Boeing has repeatedly disclosed to the United States government, including

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Throughout the merits litigation, the government maintained — "indeed boast[ed] — that its position was 'firmly established.'" 494 U.S. at 174 (Scalia, J., concurring). In the fee litigation, the government reversed its position and argued that the case was one "of first impression." Memorandum of the United States in Opposition to the Motion of the Individual Defendants for Attorney's Fees and Costs at 6, C.A. No. 86-829-A (E.D.Va., April 20, 1990); Brief for Appellant United States of America at 29, Nos. 90-3510 & 90-3513 (4th Cir., April 26, 1991).

responsible officials of the Department of Defense, the fact of these payment and the circumstances under which they are made''; that the government had ''actual knowledge of Boeing's making severance payments''; and that ''the government has never objected to the practice, and on at least one occasion informed Boeing that a proposed severance payment was in compliance with the federal conflict of interest statutes.'' App. 33a-34a.

To the district court's consideration of these circumstances, the court of appeals' answer in reversing the fee award was simple: ''We disagree.'' The court of appeals believed this enforcement history was ''a completely neutral factor.'' App. 12a. It defies logic, however, to conclude that the government's sudden, dogged and intense attempts to apply a novel and untested theory to a practice it has long acquiesced in — and had in fact initially approved in this very case — cannot support a conclusion that the government's decision to subject innocent individuals to years of litigation, enormous expense, and the personal obloquy of being charged with criminal conduct was not substantially justified.

Second, the decision below gives far too much leeway to the government. The Fourth Circuit ruled that the district court had not accorded enough weight to prosecutorial discretion to take expansive ''interpretations of the reach of untested, ambiguously drawn criminal statutes.'' App. 19a-20a. In so holding, the court of appeals ignored this Court's conclusion that section 209 was not ambiguous. 494 U.S. at 159. Even if the statute were ambiguous, however, the Fourth Circuit took an insupportably narrow view of the EAJA and ignored its goal of deterring unreasonable government litigation. *See Spencer v. NLRB*, 712 F.2d at 550; *Myers v. Sullivan*, 916 F.2d at 665. Since there are few limitations on the exercise of prosecutorial discretion, *see, e.g., Wayte v. United States*, 470 U.S. 598 (1985), there is, at least in the Fourth Circuit, little, if anything, left to the EAJA in situations such as the one before the Court. It is precisely when the government subjects an individual to the expense of litigation based on an expansive ''interpretation'' of an ''untested and ambiguously drawn criminal statute'' that the government should be required to bear the cost.

4. In reversing the district court, moreover, the court of appeals misconstrued this Court's opinions in *Crandon*. The panel ignored the primary teaching of *Crandon*, namely, that a court's focus must be on the text of the statute. The statute's text requires that the person must receive a supplement to his or her "salary" and that it be "as compensation for his services an officer or employee" of the government. All nine Justices of this Court concluded that a lump sum paid prior to entry into government service could not possibly violate the language of the statute. "The text of § 209(a) thus indicates that employment status is an element of the offense." 494 U.S. at 159. "[T]he only reasonable *meaning* of subsection (a) itself is that it applies exclusively to periodic payments." *Id.* at 174-175 (Scalia, J., concurring) (emphasis in original).

The panel majority took great comfort in the detailed analysis engaged in by this Court of the legislative history of section 209(a), which had been, in large measure, the basis of the panel's decision on the merits. By contrast, the district court correctly read this Court's opinions in *Crandon* as (1) emphasizing that construction of a criminal statute based on legislative history rarely can provide the kind of warning due process requires, (2) pointing out that the panel had relied on materials that could not properly be considered as legislative history, and (3) demonstrating that the court of appeals had misconstrued the legislative history and that the legislative history actually reinforced the text of the statute. This Court's analysis of legislative history in *Crandon*, therefore, provides no basis for overturning the district court's assessment, made after weighing all the evidence and considering numerous relevant factors, that the government had not been substantially justified in bring this lawsuit.

The Fourth Circuit's reasoning also reveals a fundamental misapprehension of the rule of lenity, on which this Court placed great emphasis in *Crandon*. Contrary to the view of the court below, however, this Court in *Crandon* did not look to the rule of lenity as a final factor to consider in a close case. Rather, this Court *began* its legal discussion with the rule of lenity and the importance of the rule in ensuring that "there is fair warning of the boundaries of

criminal conduct." 494 U.S. at 158; *cf. Jackson v. Virginia*, 443 U.S. 307, 318-19 & n. 11 (1979) (analysis required in applying "reasonable doubt" standard); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986) (analysis required in applying "convincing clarity" standard). The point was that an expansive interpretation of a criminal statute — such as the reading of section 209 preferred by the government in this case — cannot, as a matter of due process, be supported by obscure and ambiguous legislative history. Judge Hall made this compelling point when he stated:

> The rule of lenity is not a passive recognition of a statute's ambiguity; it is an affirmative principle in favor of the individual, and it protects him from the tyranny of vague criminal laws. . . . [L]enity is not merely a way to decide whether the government prevails on the merits of a foray into the boundaries of a criminal law; it is also a force the government should weigh *before* it decides to go on its foray. Our inquiry, then, should be whether the government knowing that ambiguity in the statute would be resolved against it, was substantially justified in taking the position it took on the meaning of § 209(a). The district court held that it was not, that holding is not an abuse of discretion. (App. 23a-24a (emphasis in original).)

The district court, in other words, gave appropriate weight to this critical factor. The failure of the court of appeals to apprehend this balance demonstrates the wisdom of the deferential standard of review mandated by *Pierce*. This Court should grant *certiorari* in order to reaffirm this important principle.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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May 1992

APPENDIX A
PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. MELVYN R. PAISLEY; THOMAS K. JONES; HERBERT A. REYNOLDS; HAROLD KITSON, JR.; LAWRENCE H. CRANDON, *Defendants-Appellees,* and THE BOEING, COMPANY, INC., *Defendant.*	)	No. 90-3510

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. MELVYN R. PAISLEY; THOMAS K. JONES; HERBERT A. REYNOLDS; HAROLD KITSON, JR.; LAWRENCE H. CRANDON, *Defendants-Appellees,* and THE BOEING, COMPANY, INC., *Defendant.*	)	No. 90-3513

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-86-829-A)

Argued: October 2, 1991

Decided: March 3, 1992

Before RUSSELL, HALL, and PHILLIPS,
Circuit Judges.

Reversed by published opinion. Judge Phillips wrote the majority opinion, in which Judge Russell joined. Judge Hall wrote a dissenting opinion.

COUNSEL

ARGUED: Mark William Pennak, Civil Division. UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. William Robert Stein, HUGHES, HUBBARD & REED, Washington, D.C., for Appellees. **ON BRIEF:** Stuart M. Gerson, Assistant Attorney General. William Kanter, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Henry E. Hudson, United States Attorney, Alexandria, Virginia, for Appellant. John C. Moylan, Paul Greco, HUGHES, HUBBARD & REED, Washington, D.C., for Appellees Jones, Reynolds and Kitson; Gerard F. Treanor, Jr., Amy Berrman Jackson, VENABLE, BAETJER & HOWARD, McLean, Virginia, for Appellee Crandon; Robert Plotkin, WASHINGTON, PERITO & DUBUC, Washington, D.C., for Appellee Paisley.

OPINION

PHILLIPS, Circuit Judge:

The question is the entitlement of certain government employees, appellees in this appeal, to an award of attorney fees as prevailing parties under the Equal Access to Justice Act, 28 U.S.C. § 2412 (the EAJA), following the Government's unsuccessful attempt to recover from them a civil penalty for allegedly receiving from their former private employer compensation in violation of 18 U.S.C. § 209(a). Because the former employer is legally obligated to indemnify the employees for their attorney fees in the event of their successful defense of the Government action, we conclude that they did not "incur" the fee expenses, hence are not eligible for a fee award under the EAJA. Alternatively, we conclude that in any event the Government's position in the underlying litigation was "substantially justified," so that on that basis as well the employees are not entitled to a fee award under the EAJA. Accordingly we reverse the order of the district court awarding fees to the employees.

I

In 1986, the United States brought a civil penalty action against The Boeing Company, Inc. (Boeing), and appellees, five former Boeing employees, alleging that the lump sum payments appellees received as "severance payments" from Boeing upon leaving their employment with that company, but before accepting government appointments, violated 18 U.S.C. § 209(a), a criminal statute prohibiting payment of any government employee's salary by anyone other than the Government or receipt of supplemental salary by a government employee from an outside source. Boeing advanced the attorney fees and expenses of four of the five appellees pur-

suant to agreements obligating these appellees to repay Boeing all amounts advanced "unless it shall ultimately be determined pursuant to Section 145 of the Delaware Corporation Law and Section 4 of Article VII of the By-Laws of the Company" that appellees are entitled to indemnification by Boeing.

The district court held that the payments did not violate 18 U.S.C. § 209(a); a divided panel of this court reversed; and the Supreme Court, on writ of certiorari, reversed this court, holding that the payments did not violate section 209(a) because the statute does not apply to payments made to or received by persons who, like appellees, were not government employees at the time the payments were made and received. *United States v. Boeing Co.*, 653 F. Supp. 1381 (E.D. Va. 1987), *aff'd in part and rev'd in part*, 845 F.2d 476 (4th Cir. 1988), *rev'd sub nom. Crandon v. United States*, 494 U.S. 152 (1990).

Appellees then applied to the district court for an award of attorney fees and costs of defending the action under the EAJA, which, in pertinent part, provides that a court

> shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

The Government opposed appellees' EAJA claim by arguing that because controlling Delaware law obligated Boeing to indemnify appellees, only Boeing, and not the appellees,

actually "incurred" the fees in this action.[1] The Government also argued that even if appellees were held to have incurred the fees and expenses in this matter, the Government had been "substantially justified" in bringing and prosecuting the underlying action against appellees. Rejecting both of the Government's arguments, the district court granted appellees' application for an EAJA award. *United States v. Boeing Co.*, 747 F. Supp. 319 (E.D. Va. 1990).

This appeal by the Government followed.

II

The Government challenges both grounds upon which the district court found the appellees entitled to a fee award: (1) that appellees incurred the fees and costs at issue, and are therefore eligible to recover them under the EAJA; and (2) that the Government's position in the underlying merits litigation was not substantially justified. We take these in order.

A

The Government argues that because Del. Code Ann. tit. 8, § 145(c) unconditionally required Boeing to indemnify appellees for all of their attorney fees and costs, appellees did not "incur" those expenses, an essential condition to entitlement under the EAJA. Section 145(c) provides:

> To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b)

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[1]Boeing does not qualify for recovery of fees under the EAJA. A corporation is eligible for an EAJA award only if its net worth did not exceed $7,000,000 and it had no more than 500 employees at the time the action was filed. 28 U.S.C. § 2412(d)(2)(B).

> of this section, or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

We agree with the Government.

The underlying merits litigation was of a type referred to in subsection (a) of section 145 of the Delaware Code, so that its subsection (c) applies.[2] Appellees indisputably were successful on the merits. Under these circumstances, section 145(c) plainly directs that appellees "shall be indemnified" by Boeing and we therefore hold that Delaware law requires Boeing to indemnify appellees for the attorney fees and costs of defending the underlying action.

Appellees contend, however, that even if Delaware law gave them an unconditional right to be indemnified, this does not resolve the question whether they nevertheless should be deemed to have "incurred" the expenses for EAJA purposes. They argue that they should be deemed to have incurred them because having paid them, Boeing's indemnification (or, more properly, declination to demand return of its advances) can only be counted at this point "a mere possibility." The district

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[2]Each appellee was a party to the underlying action "by reason of the fact that he is or was a director, officer, employee or agent of the corporation." Del. Code Ann. tit. 8, § 145(a). In their brief, appellees conjecture that Boeing might decline to indemnify them, taking the position that appellees were sued by the Government because of their employment with the United States, not because of their employment with Boeing. However, it was only "by reason of the fact" that appellees were employees and received payments from Boeing before going to work for the Government that they were parties to the action brought against them (and Boeing) by the Government. Any effort by Boeing to avoid liability for indemnification on that basis (a basis, it should be noted, which appellees carefully decline to suggest as more than a theoretical possibility) would not succeed.

court accepted this argument, *Boeing*, 747 F. Supp. at 321. We disagree.

To hold that a prevailing party with an unconditional legal right to indemnification of its attorney fees by a manifestly solvent third party might nevertheless qualify for an EAJA award because indemnification had not yet occurred is unacceptable for several reasons. In the first place, it necessarily would imply an assumption by a court that the indemnitor either would default deliberately on its legal obligation, or, even more questionably, would conspire with the indemnitee to alter the intended operation of the EAJA by jointly disregarding the legal right and duty.

Aside from the unseemliness of such a judicial assumption, such a holding would not in fact serve a principal purpose of the EAJA: to avoid the deterring effect which liability for attorney fees might have on parties' willingness and ability to litigate meritorious civil claims or defenses against the Government. The EAJA provides for fee-shifting precisely to avoid this result. *See SEC v. Comserv Corp.*, 908 F.2d 1407, 1415 (8th Cir. 1990). Consequently, in any situation in which the eligibility of a particular prevailing party for an EAJA award is in issue, it is appropriate to inquire whether that party would, as a practical matter, have been deterred from litigating had it been known that a fee-shifting award was not available upon a successful conclusion. If that question is asked here, it is obvious that appellees, all but one of whom were funded by an advance which by contract they need not refund if they prevailed in litigation, would not have been deterred had the EAJA not then existed. This is the critical concern underlying the EAJA precondition that a fee claimant shall have "incurred" the expense.

Accordingly, we hold that, to effectuate the purposes of the EAJA, a claimant with a legally enforceable right to full indemni-

fication of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the EAJA, hence is not eligible for an award of fees under that Act.

B

The Government also contends that even if appellees should be deemed to have "incurred" these expenses, thereby qualifying for a fee award if the other requirements of the EAJA were met, the district court also erred in concluding that the Government's position was not substantially justified. We agree.

Whether for purposes of the EAJA the Government's "position" in particular litigation is "substantially justified" has proved to be an issue of considerable conceptual and practical difficulty, given the open-endedness of the statutory language and, no doubt, the delicacy of the question. It had given the lower federal courts enough trouble that in 1987 the Supreme Court undertook to clarify the matter — so far as was possible in light of the statutory text. In *Pierce v. Underwood*, 487 U.S. 552 (1988), the Court, wrestling essentially with the two possible (almost opposite) meanings of "substantially" in this context — "considerable" (to a high degree) or "in the main" (to a reasonable degree) — came down with "in the main," i.e., "to a degree that could satisfy a reasonable person." *Id.* at 565. That comes out, said the Court, as "no different from the 'reasonable basis in law and fact' formulation adopted by . . . the vast majority of Courts of Appeals that have addressed this issue," including this court, *see Anderson v. Heckler*, 756 F.2d 1011, 1013 (4th Cir. 1985).

In the context of this case, the question of substantial justification is therefore whether the Government's "position" —that the severance payments to the Boeing employees were prohibited by 18 U.S.C. § 209(a) — was one that had a reason-

able basis in law and fact, i.e., was such as to satisfy a reasonable person. In practical terms, this comes to whether the Government attorneys who decided to bring the civil penalty action made a reasonable legal decision that § 209(a) covered the payments.

The district court held that this decision was not a reasonable legal one, that the position taken on its basis was not substantially justified. The court's conclusion was rested almost entirely on the fact that the legal position taken by the Government had in the end been found legally wrong by a unanimous Supreme Court (not to say by the district court and a dissenting court of appeals judge on the way to the Supreme Court). 747 F. Supp. at 322.

We are required to review this decision of the district court under an abuse of discretion standard. *Pierce*, 487 U.S. at 557-63. Though recognizing that such a decision may involve both factual, legal, and discretionary components, the *Pierce* Court concluded that, mainly for concerns of judicial administration, a unitary standard that accords the deference traditionally associated with abuse of discretion review was appropriate for all aspects of this decision, including even those that could be characterized as purely legal. *Id.*

Some of the practical reasons thought in *Pierce* to justify deferential review even of purely legal aspects of substantial justification decisions are not present where, as here, the merits issue has by now been finally and definitively resolved. In such a situation, there is not the general danger emphasized in *Pierce* that intensive *de novo* review of the legal aspects of an EAJA decision might indirectly compromise a still pending review of the closely-related merits issues, or encourage needless merits appeals by the Government to avoid the risk of indirect "affirmances" (on fee-claimants' EAJA appeals) of Government losses on the merits in the district courts. *See id.* at 561.

Furthermore, since *Pierce* was decided, the Court has indicated that in the comparable use of a unitary abuse of discretion standard in reviewing Rule 11 sanction decisions, flat errors of law must be considered abuses of discretion. *Cooter & Gell v. Hartmarx Corp.*, __ U.S. __, __, 110 S.Ct. 2447, 2459 (1990).

Notwithstanding these intimations that pure legal error must yet on occasion be freely reviewable under these administratively-driven deferential review regimes, *Pierce* still stands powerfully against such a view. *See Pierce*, 487 U.S. at 563 (conceding apparent need in some cases for more stringent review standard to avoid injustice, but nevertheless concluding that "the generality rather than the exception must form the basis for our rule [of deference]"). We therefore consider that even with respect to misapprehensions of controlling law, our review must be deferential in obedience to *Pierce*.

There remains the question — how deferential? *Pierce* of course wisely did not attempt to formulate the degree in terms more precise than the traditional abuse-of-discretion formulation it adopted for across-the-board application. But *Pierce* obviously contemplated a degree of deference considerably short of a simple, accept-on-faith, rubber-stamping of district court decisions on this issue. *Pierce's* own careful, detailed review to determine whether the primary EAJA decision in that case reflected an "abuse of discretion" demonstrates that the deference commanded is a suitably informed deference. See *Pierce*, 487 U.S. at 568-71 (affirming court of appeals holding of no abuse in district court's determination that Government's position was not substantially justified).

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[3]Although one of the avowed aims of the adoption of an across-the-board abuse of discretion review standard is the avoidance of duplicative judicial efforts, *see Pierce*, 487 U.S. at 560-61, it is inescapable that honest, principled review under the traditional deferential standards may yet require considerable appellate court effort. In order to declare that discretion has

In the course of its review, *Pierce* also gave some guidance on the way to conduct principled review under this standard. It first assessed the district court decision by looking at the available "objective indicia of the strength of the Government's position: in that case, the terms of the settlement agreement that ended the underlying litigation, the stage at which the merits were thereby decided, and the views of other courts on the strength, hence reasonableness, of the Government's position. Essentially finding these a washout, certainly not sufficiently favorable to the Government to find on their basis alone an abuse of discretion in the district court's decision, the Court turned to an independent assessment of the merits of the Government's position. Finding that the opposing arguments advanced by the parties on the unadjudicated merits did not "command" a conclusion that the Government's position was substantially justified, the Court concluded that the district court had not abused its discretion in its determination to the contrary. *See id.* at 568-71.

We can follow the general review process *Pierce* charted, but the available indicia inevitably are not at all the same. This case was litigated all the way to the Supreme Court, not settled before trial. No other court has ruled on the merits of the issue in other cases. Here the obvious sources for an independent assessment of the strength of the Government's merits position are the merits, decisions and opinions of the district court, the court of appeals, and the Supreme Court, rather than mere opposing contentions of counsel as to the merits.

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been abused, or clear error committed in finding facts, a substantial canvassing of the relevant materials may be required in any case of significant complexity. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 581 (1985) (Powell, J., concurring) (cautioning that Court's deliberate heightening of deference to be accorded in clear error review of factfindings should not be read to relieve appellate courts of the "type of burdensome review that may be appropriate in some cases"). Review of "discretionary" EAJA decisions can be expected frequently to require the same sort of "burdensome" review.

As did the *Pierce* Court, we look first to the available "objective indicia." Here the merits were finally decided against the Government only at the Supreme Court level. We think this at best a neutral factor. Although the fact that the claim survived through the court of appeals rather than collapsing or settling at an earlier stage points generally in the direction of strength, it obviously could not suffice, standing alone, to command a finding of substantial justification. Completely unfounded claims sometimes, for a variety of reasons, survive beyond their just desserts.

The fact that no other court has ruled on the merits — none having had a chance — is advanced by the appellees as an indication of non-justification. The fact that although § 209(a) had been on the books for 27 years, this was the first action ever brought by the Government on comparable facts indicates, they contend, the weakness of the claim, hence non-justification for its prosecution. The district court thought this persuasive. 747 F. Supp. at 322. We disagree.

We see this as a completely neutral factor in assessing the strength of the Government's position. There are any number of practical reasons other than awareness of a claim's intrinsic weakness why its attempted application by Government enforcers to a particular type of conduct may be delayed. Though this was a claim for civil penalty rather than a prosecution, the Government's interests here were essentially those that inform prosecutorial discretion in criminal matters. That discretion must and does involve the targeting of particular conduct at particular times in response to many legitimate factors having nothing to do with the general legal strength of the claim.

When we turn to an independent assessment of the strength of — the justification for — the Government's position, the

most direct indicator is that it has been rejected on the merits by the Supreme Court. As earlier noted, this was the principal basis upon which the district court found it not substantially justified for EAJA purposes.

Although the impulse to equate ultimate judicial rejection of the Government's merits position — at whatever level — with its lack of substantial justification is understandable, the courts perforce have rejected it as inappropriate, for to do so, "would virtually eliminate the 'substantially justified' standard from the statute." *Broad Avenue Laundry & Tailoring v. United States*, 693 F.2d 1387, 1391-92 (Fed. Cir. 1982). Or, as Judge Murnaghan of this court once put it, it would be "a war with life's realities to reason that the position of every loser in a lawsuit upon final conclusion was unjustified." *Evans v. Sullivan*, 928 F.2d 109, 110 (4th Cir. 1991).

Equally unacceptable is the opposite impulse: to find in an intermediate judicial determination of merit in the Government's position proof that the position was at least one that "could satisfy a reasonable person," i.e., the one or more presumably reasonable Article III judges who at some stage of the litigation found merit in it. That too, despite the possible incongruity of not so concluding, cannot be allowed, to determine the matter. To do so would be equally at "war with life's realities" in the world of judges and judging and the legal process. As a practical matter, the substantial justification issue cannot be transformed into an up-or-down judgment on the relative reasoning powers of Article III judges who may have disagreed on the merits of a Government litigation position.

In sum, merits decisions in a litigation, whether intermediate or final, cannot, standing alone, determine the substantial justification issue. But of course they — and more critically their rationales — are the most powerful available indicators of

the strength, hence reasonableness, of the ultimately rejected position. As such, they obviously must be taken into account both by a district court in deciding whether the Government's position, though ultimately rejected on the merits, was substantially justified, and by a court of appeals in later reviewing that decision for abuse of discretion.

In this case, the district court accorded no weight to the cogency of the reasoning by which two circuit judges of this court had concluded that the Government's position was not only justified, but was legally correct.[4] That reasoning was, essentially, that the critical language of § 209(a) did not "[o]n its face . . . require that payment occur while the [recipient] was a government employee"; that in total statutory context the intended legislative meaning on this critical point was ambiguous, requiring resort to legislative history; and that this history pointed to an intention to cover the type pre-government employment payments at issue. 845 F.2d at 479-80.

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[4]For the reasons just noted, the court was of course right in holding that the court of appeals decision could not "in itself" establish substantial justification. 747 F. Supp. at 222. But this does not mean, on the other hand, that the rationale of an ultimately rejected intermediate decision is, on that account alone, entitled to no weight. That may or may not be the case, depending upon the cogency of rationale for that decision, as that, in turn, is mainly indicated by the rationale for its later reversal. The point is that the mere cast of intermediate and final merits decisions, or simple head-counting of judges on different sides of the merits issue, cannot be made decisive. An independent assessment of the substantial justification for the Government position requires a deeper and more difficult inquiry. Interestingly, the district court apparently thought it necessary to discount the significance of the court of appeals' intermediate reversal of the former's ultimately vindicated merits decision. This the court did by pointing — erroneously — to *Pierce's* requirement of deference to district court decisions on the substantial justification issue itself. *Id.* As noted above, the proper view would be that the court of appeals' reversal — standing alone — was of no significance, only the cogency of its rationale was.

Indirectly alluding to the court of appeals' reasoning — which of course was relied upon by the Government in attempting to establish its substantial justification for its position — the district court considered it to have been flatly rejected by the Supreme Court. As to whether the critical language was, in the first place, ambiguous on its face — as the court of appeals had held — the district court thought that the Supreme Court had unequivocally concluded that the 'text of [Section] 209(a) . . . indicates that employment status is an element of the offense' " 747 F. Supp. at 322 (quoting *Crandon*, 110 S. Ct. at 1002). On this basis, the district court concluded that "[i]t was, therefore, unreasonable for the government to rely on a nonexistent ambiguity in the statute." *Id.*

Furthermore, opined the district court,

> even if the statute were ambiguous the authority construing Section 209, as well as the pertinent legislative history, provides no support for the government's position. As the Supreme Court found, the government's attempt to apply the statute to persons not serving as federal employees at the time of the payment was at odds with the language and clear congressional intent of Section 209.

Id. (citing *Crandon*, 110 S. Ct. at 1003-06).

In sum, the district court read the Supreme Court's rationale for reversal of the court of appeals' decision as so thorough and ready a rejection of that court's statutory interpretation as to compel the conclusion that the Government's position thereby upheld was not substantially justified.

With all respect, and with the deference we think *Pierce* commands, we think the district court so seriously underestimated the Supreme Court's recognition of the difficulty of the interpretive issue, hence of the reasonableness of the Govern-

ment's position, that its conclusion cannot be allowed to stand. At odds with the district court's reading of the Supreme Court's decision, we think that decision, fairly read, demonstrates that the interpretive issue was sufficiently difficult and arguable that the Government was completely justified in seeking to apply § 209(a) to the conduct at issue. Our assessment rests both on the general indications of difficulty reflected in the Supreme Court's decision and on a particular feature of the underlying litigation that — as the Supreme Court decision implicitly recognized — warrants special deference to the Government's litigation position in this type case.

First off, the Supreme Court decision was not, as it might have been had the interpretive issue been considered an open-and-shut one, by summary reversal. *Cf., e.g., Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (1990) (per curiam) (summary reversal of court of appeals decision respecting reach of § 1 of the Sherman Act). Instead it prompted two separate. fairly lengthy, opinions, each of which demonstrates a perception by the author that the issue was one whose resolution required significant intellectual effort, careful analysis of relevant interpretive sources, and sophisticated applications of traditional canons of statutory construction. *See Crandon*, 110 S. Ct. at 999-1007 (Stevens, J., majority opinion); *Id.* at 1007-15 (Scalia, J.. with O'Connor and Kennedy, JJ., concurring in the judgment).

Although the two opinions agree in the end that § 209(a) could not properly be interpreted to cover the pre-Government employment lump-sum severance payments there in issue, they differ on the proper interpretive route to that end. Critically, both seem to agree that the most directly applicable statutory text (that of the section's "receiving" prohibition), does not, as a matter of plain, unaided meaning, dictate the answer. *See id.* at 1002 (majority opinion) ("neither [of

§ 209(a)'s prohibitions] directly specifies when a payment must be made or received''); *id.* at 1007-08 (concurring opinion) (opining that neither prohibition, literally read, excludes the possibility that some types of payment made before or after Government employment might be covered). Both then find, with the aid of a wider contextual analysis of the specifically applicable prohibition, legislative history, and indications of general statutory policy, meanings that exclude from coverage the severance payments there at issue, but the meanings so found are different. The majority finds a congressional intent to prohibit only payments received during the period of Government employment, *id.* at 1003-06; the concurrence, an intent to prohibit only those payments, whenever made, that in some form could be considered periodic contributions to or supplementations of Government salaries, *id.* at 1008-10.

We are satisfied that any legally trained reader of the two *Crandon* opinions would see in them a Court concerned with a serious issue of statutory interpretation.

Passing these general indications of the interpretive difficulty posed by § 209(a), the most critical specific aspect of the *Crandon* Court's statutory analysis is its reliance on the rule of lenity in resolving the interpretive issue against the Government's position. Pointing out at the beginning of its analysis that ''the governing standard is set forth in a criminal statute,'' the Court noted that this made it ''appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage.'' *Id.* at 1001. And the Court concluded its analysis of statutory text, legislative history, and statutory design and policy, *see id.* at 1001-06, by reiterating its reliance on this interpretive rule in construing the reach of this criminal statute.

> Finally, as we have already observed, we are construing a criminal statute and are therefore bound to consider application of the rule of lenity. To the

> extent that any ambiguity over the temporal scope of § 209(a) remains, it should be resolved in [the employees'] favor unless and until Congress plainly states that we have misconstrued its intent.

Id. at 1007; *see also id.* at 1008, 1010 (concurring opinion) (drawing on rule of lenity).

Implicit in this of course is a perception by the Court that the statute had enough of ambiguity about it to require invocation of the rule of lenity, for that is the only occasion for its invocation. *See Liparota v. United States,* 471 U.S. 419, 427 (1985). This implication is reinforced by various specific allusions in the two opinions to the ambiguity of the § 209(a) text. *See Crandon,* 110 S. Ct. at 1005 (majority opinion) ("appropriate, in a case that raises questions about the scope of the prohibition, to identify the specific policies that the provision serves"); *id.* at 1006 (majority opinion) (noting that interpretation finding coverage under § 209(a) serves one of the two principal statutory policies, disserves the other); *id.* at 1010 (concurring opinion) (conceding that proffered interpretation "is no more successful than the Government's in giving effect to all the language of the section," and concluding on the particular interpretive problem that "at most we have an ambiguity").

We therefore think that the district court's perception that *Crandon's* ultimate unanimous rejection of the Government's position necessarily demonstrated that ambiguity justifying the Government's position was "nonexistent," is flatly belied by a careful reading of the *Crandon* Court's two opinions. Instead, in its recognition of the need to draw on the rule of lenity to resolve the interpretive issue, the Court implicitly recognized that the Government's position, taking a broader view of the statute's reach than lenity allowed the Court to take, might well be "justified," given the different roles of the

executive and judicial branches in enforcing the criminal laws. For as Justice Scalia pointed out in his concurring opinion, the Government's enforcement role requires that as between the opposing risks of taking too narrow or too broad a view of "what it may prosecute," it must in prudence choose the broad view, knowing that judicial review (including lenity in the end) stands guard against error in that choice, whereas an error in the opposite direction is not likely ever to be corrected. *Id.* at 1011.[5] In effect, this reflects a judicial perception that, within bounds of essential prosecutorial fairness, Government prosecutors have an obligation to establish the outer limits of a criminal statute's ambiguously-defined reach by making just such choices when occasion requires.

Here, despite the deference we must accord even those district court EAJA decisions that we may think legally "wrong," we think this one sufficiently wrong, with sufficiently dangerous implications for the Government's prosecutorial function, that we must consider it, under *Pierce's* standard, an "abuse of discretion." It reflects, as we have attempted to demonstrate, an insufficiently careful assessment of the true import of the *Crandon* opinions as they bear upon the strength, hence justification for, the Government's litigation position. And it necessarily implies a more cramped view of the latitude that must be accorded Government interpreta-

[5]Justice Scalia's point was not of course being made with reference to the EAJA substantial justification issue, but in addressing the merits. He was explaining why the Government's consistent pattern of interpreting § 209(a) to cover such payments as those in issue was due no judicial deference. To accord deference, he pointed out, would in effect be to convert the judicial rule of lenity into one of judicial "severity" in construing the reach of a criminal statute, since the proper prosecutorial rule is not lenity, but severity, i.e., broad interpretation. Though made in reference to the merits issue, it perfectly anticipates the substantial justification issue.

tions of the reach of untested, ambiguously-drawn criminal statutes than is acceptable.[6]

We therefore hold that, contrary to the district court's determination, the opposite conclusion, that the Government's litigation position in the underlying litigation was substantially justified, is "commanded," *see Pierce*, 487 U.S. at 470, by the most relevant indicators on that issue.

REVERSED

HALL, Circuit Judge, dissenting:

Between 1962 and 1982, through the administrations of six presidents, Boeing made twenty-one lump sum payments to employees departing for federal service. All of these payments were disclosed to the government. Until the case of the appellees, the government had acquiesced in the practice. A full four years after receiving actual notice of the payments, the government filed this suit to place a constructive trust on them. Four more years were expended as the appellees worked their way towards unanimous vindication in the Supreme Court. The price of vindication, over a half-million dollars of attorneys' fees, was dear — more, indeed, than the government's original complaint sought to recover. Today, the majority permits the government to walk away from the carnage it has wrought and leave the appellees to clean up as they may. Because I believe that the district court did not abuse its discretion in awarding EAJA attorneys' fees to appellees, I would affirm. I therefore respectfully dissent.

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[6]If, as we suggest, special latitude for Government litigation positions respecting the reach of criminal statutes may be due in assessing their justification for EAJA purposes, the special case thereby created is an exceedingly narrow one. It is limited to those relatively rare occasions when the Government has sought, as here, to recover a civil penalty for violation of a criminal statute. The EAJA does not, of course, apply to criminal prosecutions.

I.

The majority opinion turns the issue of Boeing's indemnify obligation on its head. EAJA is not served by a rule that the government may take unjustified positions in litigation against anyone who may have a collateral source to defray his attorneys' fees. I see nothing in EAJA that permits the government to stand in the back of the line to pay attorneys' fees.

The government asserts that it is legally and factually certain that Boeing must indemnify under state law; therefore, appellees have not "incurred" attorneys' fees reimbursable under EAJA.

Boeing has not yet decided whether it will indemnify appellees. The government points out that Boeing has no interest in making such a determination until this case is resolved. I do not doubt the accuracy of the government's observation. On the other hand, though I think it is likely Boeing would indemnify the appellees if they do not recover their fees in this action, I do not share the majority's confidence, *ante* at 5 n.2, that it is a foregone conclusion. Boeing must indemnify if the suit was brought against a person "by reason of the fact that he is or was a director, officer, employee or agent of the corporation." Del. Code § 145(a), (c). Aside from this court's lack of day-to-day familiarity with Delaware law, Boeing is not even before us. It may fight indemnification claims; the record before us contains no concessions or waivers from Boeing. We have no way of knowing what creative arguments its lawyers may present to the state courts.

Moreover, even if Boeing is compelled to indemnify, I do not see any particular reason why it should be the first source of reimbursement for appellees. I think it is much more reasonable to reduce Boeing's state-law obligation by the amount first recovered from the government than to do it the

other way around. The government's obligation is fault-based; Boeing's is analogous to insurance. The majority's decision implicitly rejects the wisdom of the common-law collateral source rule, which does not permit the wrongdoer to profit from his victim's foresight to secure an insurer.

The majority's authority is *SEC v. Comserv*, 908 F.2d 1407 (8th Cir. 1990). The court in *Comserv* held that a corporate officer did not "incur" attorneys' fees where those fees were paid by his employer. The important distinguishing fact of *Comserv*, however, is that the employer undertook, at the beginning of the litigation, to pay the employee's attorneys' fees, win or lose. The court found that "from the inception of the underlying lawsuit, [the employee] was able to pursue his defense in the SEC action secure in the knowledge that he would incur no legal liability for attorneys' fees." 908 F.2d at 1414.

Appellees began this litigation with none of the security of the employee in *Comerv*. The most basic difference is that the Comserv employee's fees would be paid even if he lost. In the instant case, victory was a prerequisite to even the possibility of indemnification. Therefore, appellees most definitely "incurred" fees for which they were and are personally liable. That they have another potential source from which to obtain reimbursement ought not be a defense for the government. I find the district court's observations compelling, 747 F. Supp. at 321:

> Simply put, the mere possibility of future indemnification by a company for the attorney's fees incurred by its employees is not, in itself, enough to alter the fact that employees who are ultimately liable for those fees are the real parties in interest. Were this not the case, the government would be able to viciously pursue corporate employees with the

knowledge that, due to the possibility of later corporate indemnification, the government would not be held accountable for any unjustified conduct. The EAJA would certainly not be served by such a rule.

II.

Likewise, I disagree with the alternate ground for the majority's decision. I believe that the district court did not abuse its discretion in finding that the government's position was not substantially justified.

The Supreme Court's unanimous ruling in favor of appellees rested heavily upon the rule of lenity, and the root of my disagreement with the majority lies in the significance of the Court's use of the rule. The majority notes that reliance on the rule of lenity presupposes that the statute was ambiguous; I concede as much. I disagree, though, that any colorable construction urged by the government of an ambiguous criminal statute is a substantially justified one.

The rule of lenity is not a passive recognition of a statute's ambiguity; it is an affirmative principle in favor of the individual, and it protects him from the tyranny of vague criminal laws. If an individual must parse conference committee notes and remarks of bill sponsors to discover the hidden meaning of a criminal law, the law is too ambiguous to satisfy the rule of lenity.

In other words, lenity is not merely a way to decide whether the government prevails on the merits of a foray into the boundaries of a criminal law; it is also a force the government must weigh *before* it decides to go on its foray. Our inquiry, then, should be whether the government knowing that ambiguity in the statute would be resolved against it, was substantially justified in taking the position it took on the meaning of

§ 209(a). The district court held that it was not, that holding is not an abuse of discretion.

Finally, though I recognize that the majority expressly does not so hold, *ante* at 11, I fear that we have turned the longevity of a case, the particular earnestness with which the government litigated it, and interim victories before administrative bodies or lower courts into impregnable shields against EAJA liability. *See Crawford v. Sullivan*, 935 F.2d 655, 659-660 (4th Cir. 1991) (Hall, J., dissenting). The government's trying of the case does not prove that it was substantially justified in bringing it.

I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA *Plaintiff,*	)	
v.	)	CIVIL ACTION
THE BOEING COMPANY, INC., et al., *Defendants.*	)	NO. 86-0829-A

MEMORANDUM OPINION

This matter is before the court on defendants' motion for attorney's fees and costs pursuant to the Equal Access to Justice Act, ("EAJA"), 28 U.S.C. § 2412 1982 & Supp. 1989. The court finds defendants' motion persuasive and awards attorneys' fees and costs to the defendants.

The case was an action for civil damages filed by the government against five private citizens. Specifically, the government charged these individuals with breach of a "duty of loyalty," arising from the standard set out in 18 U.S.C. § 209(a), a criminal statute. Section 209(a) prohibits a person from receiving a "supplementation of salary, as compensation for his service as an officer or employee of the executive branch of the United States . . ."

After a one-day trial, this court found that the payments were not made with the intent of supplementing the employees' government salaries, nor were they intended as compensation for government service rendered by these individuals. Thus, this court held that Section 209 does not apply to

payments made to or received by persons who, like defendants, become government employees after receipt of severance payments.

Plaintiff appealed the decision to the Fourth Circuit, which reversed this court's judgment in a divided opinion. In that decision, two of the three judges on the panel ruled that employment status at the time of payment is not an element of a Section 209(a) violation and that the payments were, in fact, intended as compensation for services as federal employees. *See United States v. Boeing Co.*, 845 F.2d 476 (4th Cir. 1988). Defendants filed a petition for rehearing *en banc*, which was denied by a vote of 6-5.

On November 6, 1989, the case was argued before the United States Supreme Court. On February 27, 1990, in a 9 to 0 decision, the Court held that Section 209(a) applies only to incumbent federal employees, reversing the judgment of the court of appeals and upholding this court's decision. *See Crandon v. United States*, 110 S.Ct. 997 (1990).

Defendants now come before the court requesting an award of attorneys' fees and costs pursuant to the EAJA. Section 2412(d)(1)(A) of that statute provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party . . . fees and other expenses, in addition to any costs awarded pursuant to subsection (a) incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction under that action unless the court finds that the position of the United States was substantial [sic] justified or that special circumstances make an award unjust.

The court finds that defendants have met all the requirements of this provision and are thus entitled to an award of

fees and costs from the United States. Defendants are clearly prevailing parties as contemplated by the EAJA. They initially prevailed at trial and won definitively and completely in the United States Supreme Court. In addition, defendants are eligible for an award of fees under the EAJA as each has a net worth under $2,000,000 and each has incurred fees and expenses in defending this case.

The government takes issue with the defendants' eligibility arguing that they are not the real parties in interest in the case and thus have not actually incurred the fees as required by the statute. The court rejects this argument.

In deciding which party is the real party in interest the court must look to the "totality of facts." *See Design and Production, Inc. v. United States*, No. 553-84C, 1990 U.S. Cl. Ct. (April 23, 1990). The totality of fact in this case suggest that the defendants were at all times the real parties in interest. Although Boeing agreed to advance the costs and fees incurred by defendants, the promise was undertaken with the understanding that all monies would be repaid unless, at a later date, Boeing's Board of Directors determined that the defendants should be indemnified. At no time was there any fee arrangement between Boeing and the defendants' counsel to shift that liability for fees. Moreover, Boeing did not retain the individuals' counsel nor did it exercise any control over the defense or conduct of attorneys. Throughout this litigation, the lawyers involved viewed themselves answerable only to the defendants they represented and viewed the defendants ultimately liable for all attorneys fees incurred.

Simply put, the mere possibility of future indemnification by a company for the attorney's fees incurred by its employees is not, in itself, enough to alter the fact that employees who are ultimately liable for those fees are the real parties in interest. Were this not the case, the government would be able

to viciously pursue corporate employees with the knowledge that, due to the possibility of later corporate indemnification, the government would not be held accountable for any unjustified conduct. The EAJA would certainly not be served by such a rule.

Having found the individuals eligible to recover fees and expenses, the court's focus now turns to whether or not the government was substantially justified in its position or whether or not special circumstances exist which would make award unjust. A finding of either would bar recovery under the EAJA.

The Supreme Court has held that the government's position is substantially justified if it would satisfy a reasonable person knowing all of the law and all of the facts. *See Pierce v. Underwood*, 108 S.Ct. 2541, 2550 (1988). Considering all the circumstances surrounding this litigation, the court concludes that the government has not met this burden.

Although 18 U.S.C. Section 209 has been on the statute books in its current form for 27 years, this is the first time the government has ever brought a civil or criminal case against anyone for receiving a severance payment, and this is the only time the government has tried to apply that provision to a person receiving any kind of payment before entering federal service. The government argues that its position was justified, nevertheless, because the statute on its face is not restricted to recipients who are government employees on the date they receive the disputed payment. However, the Supreme Court unequivocally concluded that the "text of [Section] 209(a) . . . indicates that employment status is an element of the offense." *Crandon* 110 S.Ct. at 1002. It was, therefore, unreasonable for the government to rely on a nonexistent ambiguity in the statute in filing suit against these private citizens.

Moreover, even if the statute were ambiguous the authority

construing Section 209, as well as the pertinent legislative history, provides no support for the government's position. As the Supreme Court found, the government's attempt to apply the statute to persons not serving as federal employees at the time of the payment, was at odds with the language and clear congressional intent of Section 209. *See Id.*, at 1003-06. Although the government has the right to seek modification or repudiation of established doctrine, the EAJA exists to ensure that individual private litigants are not compelled to subsidize such reevaluations. *See Spencer v. NLRB*, 712 F.2d 539, 559 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

Nor does the fact that two appellate judges agreed with the government's position make it a substantially justified one. The fact that one other court agreed with the government does not, in itself, establish substantial justification. *Pierce*, 108 S.Ct. at 2552. Moreover, there is no support for the contention that an appeals court decision should be given greater weight than that of a trial court. On the contrary, because trial courts are in a better position to know all of the facts concerning the government's prosecution of the case, appellate courts must defer to district courts in determining whether substantial justification exists. *Id.*, at 2547. There is certainly no substantial justification in this particular case, where the Supreme Court soundly and unanimously rejected the appellate court's approach, holding that it had erroneously disregarded the plain language of the statute and established precedent. *See generally, Crandon*, 110 S.Ct. 997.

As the Fourth Circuit decision does not impede defendants' EAJA claim, the court is free to find, as it does, that a reasonable person knowing all the facts and all the law involved in this case would not be satisfied by the government's arguments. The defendants are thus entitled to an award of

reasonable fees and costs from the government.

Although the government challenges the reasonableness of the fees and costs defendants have requested, the court finds the requested amounts to be appropriate. The government first challenges the $106 hourly rate employed by defendants. There is no dispute that $106 per hour is the current statutory rate under the EAJA ($75.00 increased by CPI adjustments); however, the government argues that the cost of living calculation should be done individually for each bimonthly period in which services were performed rather than one calculation using the current CPI. The court does not agree. The CPI should serve as a disincentive to the government to prolong the litigation process. *See Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 703 F.2d 700, 713 (3d Cir. 1983). More importantly, only by using the recent CPI in calculating the fee amount will attorneys receive, in today's dollars, the purchasing power to which they are entitled. *Garcia v. Schweiker*, 829 F.2d 396, 402 (3rd Cir. 1987).

The government also argues that the $50 hourly rate claimed for the work of law clerks and paralegals is excessive, and that such time should be compensated at the rate that the law firm actually pays these employees. However, the Supreme Court has held that in calculating awards under fee shifting statutes, paralegal time and law clerk time should be compensated at market rates, not at the cost to the particular attorneys employing them. *See Missouri v. Jenkins*, 109 S.Ct. 2463, 2469-72 (1989). Although *Missouri v. Jenkins* involved a § 1988 case, its holding and logic applies to other fee shifting statutes, including the EAJA. *See, e.g., Raton Gas Transmission Co. v. F.E.R.C.*, 891 F.2d 323, 329-30 (D.C. Cir. 1989) (applying logic to EAJA). In this case it appears that defendants have asked for a rate which is less than that which clients are billed for paralegal and law clerk time. *See, e.g.*, Stein Decl.,

par. 21, and Plotkin Affidavit, par. 6. The court finds that the hourly rate requested by defendants for support services is neither unreasonable or excessive.

Next, the government makes a general assertion that the stated number of hours worked by defendants is excessive. The government offers no concrete challenge to the reasonableness of the fees claimed nor does it point out specific time that was improperly spent. For this reason the government is not entitled to a reduction in the fee request.

The government also challenges certain expenses claimed by defendants and asserts that they are not compensable under the EAJA. However, the majority of courts addressing this issue have held that expenses claimed by defendants are compensable under the EAJA. *See, e.g., International Woodworkers of Am., AFL-CIO, Local 3-98 v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1986). Moreover, in *Missouri v. Jenkins*, 109 S.Ct. at 2470-72, the Supreme Court asserted that the key question in considering what is proper under fee shifting statutes is what would be normally billed to the client. This certainly would include requests for costs associated with the litigation.

Finally, the court finds that defendants are entitled to recover the costs of filing and arguing this EAJA motion. *See Commissioner, I.N.S. v. Jean*, 110 S.Ct. 2316 (1990). An appropriate order shall issue.

/s/ Claude M. Hilton

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
August 14, 1990

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 86-0829-A
THE BOEING COMPANY, INC., MELVYN R. PAISLEY, THOMAS K. JONES, HERBERT A. REYNOLDS HAROLD KITSON JR. AND LAWRENCE H. CRANDON, *Defendants.*	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The Boeing Company ("Boeing") is a corporation organized and existing under the laws of the State of Delaware. The corporate headquarters are located at 7755 East Marginal Way South, Seattle, Washington. Boeing maintains an office and conducts business within the geographical limits of the jurisdiction of this Court.

2. Defendant T.K. Jones ("Jones") is a resident of the State of Washington; Defendant Melvyn Paisley ("Paisley") is a resident of the Commonwealth of Virginia; Defendant Herbert A. Reynolds ("Reynolds") is a resident of the State of Washington; Defendant Harold Kitson, Jr. ("Kitson") is a resident of the State of Washington; Defendant Harold Crandon ("Crandon") is a resident of Brussels, Belgium.

3. Boeing traditionally has encouraged public service by its employees. Some forms of public service, such as service in state or local government, do not require a complete severance of the individual's employment relationship with Boeing. Boeing has made financial arrangements with its employees who accept positions in state and local government, such as paid leave, in an effort to diminish the personal economic incentives associated with public service.

4. Over the past twenty years, the Department of Defense has regularly solicited highly qualified employees from Boeing for government service. The government repeatedly has asked Boeing to assist it in identifying such qualified employees, and has specifically requested that Boeing encourage these employees to accept positions in the Federal government.

5. Boeing has a long-standing practice of making severance payments to individuals who terminate their employment with the Company in order to enter government service. In making these payments, Boeing has endeavored to encourage its employees to serve their government and provided a mechanism to completely sever all financial ties between Boeing and the departing employee.

6. During the period from 1962-1982, Boeing made at least twenty-one severance payments to individuals who terminated their employment with the Company in order to enter government service.

7. Boeing has repeatedly disclosed to the United States government, including responsible officials of the Department of Defense, the fact of these payments and the circumstances under which they are made. One such disclosure letter specifically noted that severance payments were calculated with reference to the differential between the financial benefits that would accrue to the employee if he remained with Boe-

ing, as compared with those that would accrue to the employee if he accepted the anticipated government position.

8. Despite actual knowledge of Boeing's practice of making severance payments, the government has never objected to the practice, and on at least one occasion informed Boeing that a proposed severance payment was in compliance with the federal conflict of interest statutes.

9. During 1981 and 1982, each of the individual defendants was recruited from Boeing by the federal government for a position within the Department of Defense.

10. On or about May 19, 1981, Jones resigned from Boeing and, on or about June 1, 1981, he assumed the position of Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces.

11. On or about October 31, 1981, Paisley retired from Boeing. On December 2, 1981, following Senate confirmation, Paisley was sworn in as Assistant Secretary of the Navy for Research, Engineering and Systems. Paisley continues to serve in this position.

12. On or about July 22, 1981, Reynolds resigned from Boeing. On July 26, 1981, he became a consultant to the Defense Department and on October 4, 1981, received an appointment to the position of Deputy Director of Space and Intelligence Policy.

13. On March 5, 1982, Defendant Crandon resigned from Boeing. On or about March 8, 1982, he was appointed to the position of computer scientist with the North Atlantic Treaty Organization ("NATO") Air Command and Control Systems ("ACCS ") Team in Brussels, Belgium. Crandon continues to serve in this position.

14. On August 1, 1982, Kitson retired from Boeing. Kitson served as a consultant to the Department of Defense from

August 2, 1982, until September 1982, when he was appointed Deputy Assistant Secretary of the Navy for Command, Communications and Control Intelligence.

15. Boeing made severance payments to the five individual defendants on the following dates: T. K. Jones, May 19, 1981; Herbert R. Reynolds, July 22, 1981; Melvyn R. Paisley, October 1, 1981; Lawrence H. Crandon, March 5, 1982; and Harold Kitson, Jr., July 31, 1982.

16. At the time Boeing made and the individual defendants accepted the severance payments in question, the individuals were still employed by Boeing and had not yet entered into government service.

17. The severance payments made to the individual defendants were not contingent upon the individuals entering into federal government service, the position assumed in the federal government, the agency served in the federal government, their remaining in government service for any stated period of time, or their returning to Boeing at anytime in the future. Once the individual separated from the Company, the severance payment was his unconditionally, no matter what he did in the future.

18. At the time the individual defendants left Boeing, Boeing did not make any commitment to rehire them at any time in the future and the individuals made no commitment to return to Boeing. Although Boeing might have been willing ultimately to reemploy the individuals, it had no expectation that the individuals would return to the Company at the time that they terminated their employment.

19. The severance payments to these individual defendants were not made with the intent that the individuals would give Boeing preferential or other favorable treatment during the

term of their government employment, and the payments were not understood by the individuals as such.

20. Staff personnel in the Industrial Relations Department performed calculations to arrive at a proposed severance payment for presentation to individuals within Boeing with final decision making authority. Those responsible for the ultimate decision were not aware of the specific calculation method followed by the Industrial Relations Staff, and approved severance payments to the individual defendants based on their determination that the proposed payment was reasonable and fair to the departing employee.

21. Boeing never asked the individual defendants to provide it with any preferential treatment or special advantages during their tenures with the government, and the individuals in fact never provided Boeing with any such preferential treatment or special advantage.

22. The severance payments made to the individual defendants were not intended by Boeing as a supplementation of their government salaries or as compensation for their government services. The individual defendants did not understand the severance payments to be compensation for their services to the government or a supplement to their government salaries.

23. The government supervisors of each of the individual defendants were and are fully satisfied that the individuals capably and honorably performed their public duties without bias and with independence and impartiality and have never engaged in or otherwise participated in a conflict of interest.

24. At no time has the Department of Defense taken any disciplinary or other adverse action against any of the individual defendants, although it has had actual knowledge of their previous employment by Boeing and their receipt of a severance payment from Boeing.

25. The severance payments were understood by the individual defendants to be partial compensation for the loss of benefits which they had earned as a result of their prior service with Boeing. They were informed by Boeing that the payment was a means of avoiding any possible conflict of interest by severing all financial connections with Boeing.

26. Before entering into government service, during the course of routine ethics reviews, Messrs. Jones and Paisley disclosed to attorneys in the Office of the General Counsel of the Department of Defense and the Navy, respectively, of the fact and amount of the severance payments which they received from Boeing. Jones also discussed his receipt of the Boeing severance payment with his government superiors, Under Secretary of Defense Dr. Richard DeLauer, and Dr. DeLauer's Executive office, Colonel Kenneth Hollander. Jones was assured that he could accept the anticipated severance payment.

27. Messrs. Jones, Reynolds, Kitson and Paisley disqualified themselves from working on any Boeing-related matters as of September 1982. The disqualifications applicable to Messrs. Jones, Reynolds and Kitson remained in effect for the balance of the period of their government service. Mr. Paisley resumed participation in a Boeing-related project on September 17, 1984, at the express direction of Secretary of the Navy, John Lehman. In his government position, Mr. Crandon has no direct procurement role, does not award contracts and does not make source selection decisions.

28. The amounts of the severance payments to the individual defendants were recorded in the overhead pools on the accounts of BAC. The account in which these payments were recorded is systematically and regularly monitored by auditors of the Defense Contract Audit Agency ("DCAA") of the Department of Defense, resident at the Boeing facility.

Payments were recorded on the following dates: Jones, May 21, 1981; Reynolds, July 30, 1981; Paisley, October 8, 1981; Crandon, February 25, 1982; Kitson, July 29, 1982.

29. During the course of such routine monitoring of BAC's overhead costs, DCAA auditors noted the severance payments to Messrs. Jones, Reynolds and Paisley. During the period from November 1981 to January 1982, DCAA auditors requested information from Boeing about these payments. In response, Boeing informed the auditors of the Company's historical practices of making severance payments and the basis for the severance payments to these individuals, including specifically the factors considered in arriving at the payment amount.

30. As a result of this dialogue, as of mid-February 1982, the DCAA Resident Auditor at BAC, the DCAA Branch Manager of the Puget Sound Branch, and Director of the San Francisco Region of DCAA were aware of the following: that severance payments had been made to Messrs. Jones, Reynolds and Paisley; the amount of the payments; the government positions assumed by these individuals following their separation from Boeing; the factors now alleged by the government to have been considered by Boeing in arriving at the amount of the payment; and the method by which Boeing accounted for those payments pursuant to Armed Services Procurement Regulation 15-205.39.

31. Each year the government calculates a percentage of costs included in the overhead pools of contractors that the government anticipates or projects will ultimately be disallowed when the overhead claim is closed. This calculation of anticipated unallowable costs is expressed as a percentage of the total overhead pools, and is called the withhold rates. The government unilaterally establishes these withhold rates. Boeing applies the withhold rate to the overhead dollars to be billed

on each contract, and the resultant dollars are withheld from periodic contract payments made by the government to Boeing.

32. The withhold rate is set annually and adjusted periodically during the course of the year at the discretion of the government's Administrative Contracting Officer. The withhold rate is set at a level intended to cover all potential unallowable costs. In the past, the application of the withhold rate has resulted in the government withholding monies in excess of Boeing Aerospace Company's total costs ultimately disallowed in every year.

33. In 1981, during the period in question, $7.8 million to $4.4 million was withheld. For 1982, $4.6 million to $3.9 million was withheld.

34. Overhead claims of Boeing Aerospace Company for the years 1981 and 1982 have not been finally settled to date. The withhold rates set by the government for those years are more than adequate to cover all costs which may ultimately be disallowed, including the severance payments paid by Boeing during those years. Moreover, even if the withhold rates established for 1981 and 1982 were not sufficient to cover all ultimately disallowed costs for those years, that will not be known until the overhead claims for those years are finally settled.

35. On March 22, 1985, at the request of the Civil Division of the Department of Justice, Boeing executed an agreement tolling the three-year statute of limitations governing the government's tort claim against Boeing, set forth in 28 U.S.C. § 2145(b). The agreement, which was prospective only, contained an effective date of March 25, 1985.

36. The Plaintiff commenced this action on July 22, 1986.

Conclusions of Law

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1345, and venue is proper in this Court pursuant to 28 U.S.C. § 1391(b). The government contends it has a cause of action under the federal common law for breach of fiduciary duty created by 18 U.S.C. § 209 against both the recipients of a salary supplement for government services and against the payer of such a supplement. It also claims a cause of action against the individual defendants for breach of an implied contract. At the trial the government elected to proceed against Boeing in tort for breach of fiduciary duty and against the individual defendants for breach of implied contract.

At the time that Boeing made and the individuals accepted the severance payments in question, the individuals had not yet entered into government service and were not employees of the United States government. For this reason, there was no principal-agent relationship between the individual defendants and the United States government at the time that Boeing made, and the individuals accepted, those payments. *See Restatement (Second) of Agency*, § 387 (1958).

Because they were not government employees, the individual defendants owed no fiduciary or other duty to the United States government at the time of the severance payments. *See id.* In accepting those payments, the individuals therefore breached no common law or other duty owed to the United States government, and Boeing did not induce or otherwise participate in any breach of fiduciary duty by the individual defendants.

Even assuming that the individual defendants owed a fiduciary duty to the United States government at the time of the severance payments in question, neither the making, acceptance or retention of those payments constituted or induced in any fashion a breach of that duty.

18 U.S.C. § 209(a) provides . . .

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the Executive Branch of the United States government, of any independent agency of the United States, or the District of Columbia, from any source other than the government of the United States, except as may be contributed out of the treasury of any state, county, or municipality; or
>
> Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

18 U.S.C. § 209 forbids the supplementation of salary and does not apply to the giving of a severance payment by a private employer to an employee who has not, at the time of receipt, entered into government service. Moreover, the acceptance of a severance payment by a non-government employee does not violate 18 U.S.C. § 209. *See* S. Rep. No. 2213, 87th Cong. 2d Sess. ***reprinted in*** 1962 Code Cong. & Ad. News 3852, 3863.

Even if 18 U.S.C. § 209 were read to apply to the defendants in this case, the Court concludes that that statutory section was not violated. Based on all the evidence before the Court, including the testimony of the witnesses, the Court finds that the severance payments in question were not made by Boeing with the intention of supplementing the individual defendants' government salaries, nor were they intended as compensation for government services rendered by

those individuals. Similarly, the severance payments were not accepted by the individual defendants as a supplementation to their government salaries or as compensation for their government services. The government contends that the use of salary loss as a method of computation necessarily has a prospective effect which equates to a salary supplementation. This ignores the fact that the use of salary figures and benefits are an accurate measure of past contributions to the company. Salaries are paid on the basis of length of service and level of performance. In any event the formula for calculation of severance pay cannot make the payment something other than severance pay. The payments made by Boeing were severance payments made to sever the relationship with these employees based on past performance and accumulated benefits. The payments therefore were not contrary to the standards of conduct established by Section 209. *See United States v. Muntain*, 610 F.2d 964 (D.C. Cir. 1969).

The defendants cannot be said to have violated the Department of Defense regulations codified in 32 C.F.R. Part 40 (1980). Those regulations by their express terms apply only to employees of the Department of Defense. Because the individual defendants were not employees of the United States government at the time they accepted the payments, they were not bound by those regulations, and their conduct was not prohibited by the regulations. For this reason, the Court concludes that severance payments, as made here, did not violate these regulations.

The defendants also did not violate standards of conduct established by common law principles of agency. In accordance with those principles, an agent may be held liable to his/her principal for receipt of undisclosed, secret profits which create a conflict of interest. *See Continental Management, Inc. v. United States*, 527 F.2d 613 (Ct. Cl. 1978). The severance

payments here at issue were timely disclosed to responsible agents of the United States government. The payments were not in the nature of "secret profits," and could not in any fashion tend to subvert the loyalty of the individual defendants to the United States government. *See also United States v. Carter*, 217 U.S 286 (1910); *United States v. Kenealy*, 646 F.2d 699 (1st Cir.), *cert. denied*, 454 U.S 941 (1981); *United States v. Kearns*, 595 F.2d 729 (D.C. Cir. 1978).

These payments created neither the appearance of nor an actual conflict of interest. None of the individual defendants were in a position in the government to provide preferential treatment to Boeing and in fact none of the individual defendants rendered preferential treatment to Boeing while a government employee. Under these circumstances, neither the making nor the acceptance of the severance payments could be said to have created an actual or a potential conflict of interest, or a corresponding breach of the employees' duty of undivided loyalty.

The government was not injured by the making or acceptance of these payments. The severance payments were not made with the intent to secure preferential treatment for Boeing. The individuals never rendered preferential or other favorable treatment to Boeing during their respective periods of government service. Under these circumstances, the government cannot be said to have been injured by the challenged conduct. Having in fact suffered no harm, the government is not entitled to recover damages.[1] *See Continental Management, Inc. v. United States*, 527 F.2d at 619 n.6.

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[1]In any event, the government would not be entitled to recover damages twice — once from Boeing, and once again from the individual defendants. *See Continental Management, Inc. v. United States*, 527 F.2d at 619.

Moreover, the government is not entitled to recover interest on the amount of the severance payments for the period of time during which they were recorded by Boeing as an overhead cost. At the government's direction, Boeing has withheld from the amount of overhead costs billed to the government on government contracts an amount which is sufficient to cover the amount of the challenged payments. The government therefore has not paid to Boeing an amount representing these payments. Again, having suffered no injury, the government is not entitled to recover the damages which it here claims. Moreover, inasmuch as Boeing's overhead rates for 1981 and 1982 have not been finally negotiated, this claim by the government is not ripe, and would be justifiable, if at all, only before the Board of Contract Appeals or Claims Court.

The defendant, Boeing, also raises as a defense the statute of limitations. The Court finds that the government's claims as to the first four of the questioned severance payments are barred by 28 U.S.C. § 2415(b). For purposes of computing the running of this statute of limitations period, the government's cause of action is deemed to have accrued on the date on which the severance payments were made. *See, e.g., United States v. Central Soya, Inc.*, 697 F.2d 165 (7th Cir. 1982); *United States v. Limbs*, 524 F.2d 799 (9th Cir. 1975); *Dameron v. Washington Magazine, Inc.*, 575 F.Supp 1578 (S.D.N.Y. 1983).

The severance payments to Messrs. Jones, Reynolds, Paisley and Crandon were each made more than three years prior to the March 25, 1985 effective date of the statute of limitations tolling agreement executed by Boeing on March 22, 1985. The government actually knew, or with the exercise of reasonable diligence could have known, all the facts underlying its cause of action as to the payments to Messrs.

Jones, Reynolds, Paisley and Crandon, more than three years prior to March 25, 1985. Accordingly, the government's claim for damages against Boeing as to these individuals arising from these payments is time barred.

For reasons set forth above, judgment on all counts will be entered for the defendants.

An appropriate order shall issue.

/s/ Claude M. Hilton

United States District Judge

Alexandria, Virginia

Date: February 17, 1987

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 86-0829-A
THE BOEING COMPANY, INC., MELVYN R. PAISLEY, THOMAS K. JONES, HERBERT A. REYNOLDS HAROLD KITSON JR. AND LAWRENCE H. CRANDON, *Defendants.*	)	

ORDER

Pursuant to the attached Findings of Fact and Conclusions of Law, it is hereby:

ORDERED that judgment is entered on behalf of the defendants, and this case is DISMISSED.

/s/ Claude M. Hilton

United States District Judge

Alexandria, Virginia

February 17, 1987

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Date: August 14, 1990

Present: DORIS R. CASEY

United States of America	)	
	)	
v.	)	
	)	
The Boeing Company, Inc.,	)	CIVIL ACTION
et al.	)	NO. 86-0829-A
	)	

ORDER that pltf shall pay to deft. L. Crandon $65,503.80 in attorneys fees and in costs incurred as a result of legal representation performed on his behalf by the firm of Venable, Baetjer, Howard & Civiletti.

Pltf. shall pay to defts T. Jones, Harold Kitson, Jr., Melvyn Paisley and H. Reynolds $423,586.66 in attorneys fees and costs incurred as a result of legal representation performed on their behalf by the firm of Hughes Hubbard & Reed.

Pltf shall pay to defts T. Jones, H. Kitson, Jr., and Herbert Reynolds an additional $6,457.50 in attorneys fees and costs incurred as a result of legal representation performed by P. Lacovara, Esq., individually.

Pltf. shall pay to deft. M. Paisley an additional $5,084.62 in attorneys fees & costs for legal representation of Laxalt, Washington, Perito & Dubuc.

UNITED STATES OF AMERICA
EASTERN DISTRICT OF VIRGINIA

I, DORIS R. CASEY **Clerk of the United States District Court for the Eastern District of Virginia, do hereby certify that the foregoing is a true extract of the order entered in the case of *United States of America v. The Boeing Co., Inc., et al.*, Civil Action No. 86-0829-A as will more fully appear from the records of the said Clerk's Office.**

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court at Alexandria, Virginia this 11th day of October, A.D., 1990.

DORIS R. CASEY

By: /s/ Sandra J. Sacchetti
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Date: October 11, 1990

Present: DORIS R. CASEY

United States of America	)	
	)	
v.	)	CIVIL ACTION
The Boeing Company, Inc.,	)	NO. 86-0829-A
et al.,	)	
	)	

ORDER that pltf. shall pay to Hughes Hubbard & Reed, counsel for various individual defts., $44,669.21 in attorney fees & costs incurred as a result of legal representation of the individual defts in connection with litigation of defts' motion for attorney fees & costs;

Pltf shall pay to Venable, Baetjer, Howard & Civiletti, counsel for deft. L. H. Crandon, $1638.30 in attorney fees & costs incurred in connection with litigation of defts' motion for attorney fees & costs;

FURTHER ORDERED that the Clerk shall enter judgment against the United States in accordance with this Order and the Court's Order filed on August 14, 1990 in this action.

UNITED STATES OF AMERICA
EASTERN DISTRICT OF VIRGINIA

I, DORIS R. CASEY **Clerk of the United States District Court for the Easterrn District of Virginia, do hereby certify that the foregoing is a true extract of the order entered in the case of *United States of America v. the Boeing Company, Inc., et al.*, Civil Action No. 86-0829-A as will more fully appear from the records of the said Clerk's Office.**

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court at Alexandria, Virginia this 11th day of October, A.D., 1990.

DORIS R. CASEY

By:/s/Sandra J. Sacchetti
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA *Plaintiff,*	)	
v.	)	CRIMINAL NO. 86-0829-A
THE BOEING COMPANY, INC., ET AL., *Defendants.*	)	

ORDER

This matter came before the Court on defendants' motion and second supplemental application for attorneys' fees and costs. For the reasons stated in the memorandum opinion filed in this action on August 14, 1990, it is hereby

ORDERED that plaintiff shall pay to Hughes Hubbard & Reed, counsel for various individual defendants, $6,988.00 in attorney fees and costs incurred as a result of legal representation of the individual defendants in opposing the government's motion for reconsideration.

/s/ Claude M. Hilton

United States District Judge

Alexandria, Virginia
October 2, 1990

copies to: counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA *Plaintiff,*	)	
v.	)	CRIMINAL
	)	NO. 86-0829-A
THE BOEING COMPANY, INC., et al., *Defendants.*	)	

ORDER

This matter came before the court on the plaintiff's motion for reconsideration of its award of attorney's fees and costs. It appearing to the court that the issue was properly decided, and for reasons stated in the Memorandum Opinion and Order entered on August 14, 1990, it is hereby

ORDERED that the plaintiff's motion for reconsideration is DENIED.

/s/ Claude M. Hilton

United States District Judge

Alexandria, Virginia
September 7, 1990

copies to: counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 86-0829-A
THE BOEING COMPANY, INC., et al., *Defendants.*	)	

ORDER

This matter came before the Court on defendants' motion for attorney's fees and costs. For the reasons stated in the accompanying memorandum opinion, it is hereby;

ORDERED that defendants' motion is GRANTED and it is further ORDERED that:

Plaintiff shall pay to defendant Lawrence Crandon $65,503.80 in attorneys fees and in costs incurred as a result of legal representation performed on his behalf by the firm of Venable, Baetjer, Howard & Civiletti;

Plaintiff shall pay to defendants Thomas K. Jones, Harold Kitson, Jr., Melvyn R Paisley and Herbert Reynolds $423,586.66 in attorneys fees and costs incurred as a result of legal representation performed on their behalf by the firm of Hughes Hubbard & Reed;

Plaintiff shall pay to defendants Thomas K. Jones, Harold Kitson, Jr., and Herbert Reynolds an additional $6,457.50 in attorneys fees and costs incurred as a result of legal representation performed by Philip A. Lacovara, Esq., individually;

Plaintiff shall pay to defendant Melvyn R. Paisley an additional $5,084.62 in attorneys fees and costs incurred as a result of legal representation performed on his behalf by the firm of Laxalt, Washington, Perito & Dubuc; and

Defendants shall submit their requests for fees and costs associated with arguing this motion within ten days. Plaintiff then shall have five days in which to respond.

/s/Claude M. Hilton

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
August 14, 1990

APPENDIX E

FILED: March 3, 1992

JUDGMENT
UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 90-3510
CA-86-829-A

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

MELVYN R. PAISLEY; THOMAS K. JONES; HERBERT A. REYNOLDS; HAROLD KITSON, JR.; LAWRENCE H. CRANDON

Defendants-Appellees

and

THE BOEING COMPANY, INC.

Defendant

No. 90-3513
CA-86-829-A

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

MELVYN R. PAISLEY; THOMAS K. JONES; HERBERT A. REYNOLDS; HAROLD KITSON, JR. LAWRENCE H. CRANDON

Defendants-Appellees

and

THE BOEING COMPANY, INC.

Defendant

Appeals from the United States District Court for the Eastern District of Virginia at Alexandria

These cases were heard by the Court on the record from the District Court and were argued by counsel.

The Court reverses the judgement of the District Court.

/s/JOHN M. GREACEN

Clerk